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82-1042
No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STEPHEN M. SUNDHEIMER,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD M. PHILLIPS
Attorney for Petitioners
1900 M Street, N.W.
Washington, D.C. 20036
(202) 452-7040

Of Counsel:

JOHN M. BURNS, III
360 Lexington Avenue
New York, New York 10017
(212) 687-6290

QUESTIONS PRESENTED FOR REVIEW

I. May a federal agency expand its statutory authority by prosecuting acts which are merely "tantamount to" violations proscribed by statute?

II. Does the term "accommodation trade", as prohibited by §4C(a) of the Commodity Exchange Act, include non-fictitious transactions?

III. Is the term "accommodation trade", as prohibited by section 4C(a) of the Commodity Exchange Act, and as applied by the Commodity Futures Trading Commission, void for vagueness?

IV. May a federal agency, without notice, change the theory of its case and summarily impose harsh sanctions?

V. Does a general plea of guilty, and pleading allocution, to a single-count criminal information

containing many elements, any one of which would be sufficient to convict, establish all elements charged in the information sufficient to support summary disposition by a federal agency required by statute to hold an adjudicatory hearing?

VI. Does a federal agency which is required to consider evidence of rehabilitation behave arbitrarily and capriciously in rejecting uncontested evidence of rehabilitation (and imposing sanctions) under an unannounced rule that rehabilitation cannot occur before a minimum passage of time (more than seven years) has elapsed?

PARTIES

Petitioner is Stephen M. Sundheimer.

Respondent is the Commodity Futures Trading Commission.

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IN THE

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OCTOBER TERM 1982

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STEPHEN S. SUNDHEIMER,

Petitioner,

-against-

COMMODITY FURURES TRADING COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner Stephen M. Sundheimer respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Second Circuit issued in this action on September 3, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 688 F.2d 150. The decision and order of the full Commodity Futures Trading Commission issued on September 16, 1981, and amplified by a further order is reported at 2 Comm. Fut. L. Rep. (CCH) ¶21,245 (1981). The opinion of the administrative law judge is not reported.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit was filed on September 3, 1982. The Court of Appeals denied a petition for a rehearing (with a suggestion that it be heard En Banc) on October 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

RELEVANT STATUTES AND RULES

COMMODITY EXCHANGE ACT OF 1974

Sec. 4c. (a) It shall be unlawful for any person to offer to enter into, enter into or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transactiuon in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--

(A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale", "cross-trade", or "accomodation trade", or is a

fictitious sale;

* * *

(C) if such transaction is used to cause any price to be reported, registered, or recorded which is not a true and bona fide price.

* * *

Sec. 6(b) If the Commission has reason to believe that any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, * * * or otherwise is violating or has violated any of the provisions of this Act or of the rules, regulations, or orders of the Commission thereunder, it may serve upon such

person a complaint stating its charges in that respect, which complaint shall have attached or shall contain therein a notice of hearing, specifying a day and place not less than three days after the service thereof, requiring such person to show cause why an order should not be made prohibiting him from trading on or subject to the rules of any contract market, and directing that all contract markets refuse all trading privileges to such person, until further notice of the Commission, and to show cause why the registration of uch person, if registered as futures commission merchant or any person associated therewith as described in section 4k of this Act, commodity trading advisor, commodity pool operator, or as floor broker

hereunder, should not be suspended or revoked. Said hearing may be held in Washington, District of Columbia, or elsewhere, before the Commission or before an Administrative Law Judge designated by the Commission * * *. Upon evidence received, the Commission may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading privileges thereon for such period as may be specified in the order, and, if such person is registered as futures commission merchant or any person associated therewith as described in section 4k of this Act, commodity trading advisor, commodity pool operator, or as floor broker hereunder, may suspend, for a period not to exceed

six months, or revoke, the registration of such person, and may assess such person a civil penalty of not more than $100,000 for each such violation. * * * After the issuance of the order by the Commission, as aforesaid, the person against whom it is issued may obtain a review of such order or such other equitable relief as to the court may seem just by filing in the United States court of appeals of the circuit in which the petitioner is doing business a written petition, within fifteen days after the notice of such order is given to the offending person, praying that the order of the Commission be set aside. * * * Upon the filing of the petition the court shall have jurisdiction to affirm, to set aside, or modify the order of the Commission, and the

findings of the Commission, as to the facts, if supported by the weight of evidence, shall in like manner be conclusive.

Sec. 6(d) In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market--the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market--the appropriateness of such penalty to the net worth of the person

charged, and the gravity of the violation.

* * *

Sec. 8a. The Commission is authorized--

(2) to refuse to register any person--

* * *

(B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant, * * * was convicted of a felony in any State or Federal court, * * *

* * *

(3) in accordance with the procedure provided for in paragraph (b) of section 6 of this Act, to suspend or revoke the registration of any person registered

under this Act if cause exists under subparagraph (2)(B) or (C) which would warrant a refusal of registration of such person,

* * *

Sec. 13. (a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this Act, or any of the rules, regulations or orders issued pursuant to this Act, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this Act or any of such rules, regulations, or orders may be held responsible in

administrative proceedings under this Act for such violation as a principal.

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C.A. §704. Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A prelimimary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides

that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C.A. §706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional

right, power privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party,

and due account shall be taken of the rule of prejudicial error.

CFTC RULES OF PRACTICE

§10.91 Summary Dispositions

(a) Filing of motions, answers. Any party who believes that there is no genuine issue of material fact to be determined and that he is entitled to a decision as a matter of law may move for a summary disposition in his favor of all or any part of the proceeding.

* * *

(b) Supporting papers. A motion for summary judgment shall include a statement of material facts as to which the moving party contends there is no genuine issue, supported by the pleadings, and by affidavits, other verified statements, including investigative transcripts, admission, stipulations,

and depositions. The motion may also be supported by briefs containing points and authorities in support of the contention of the party making the motion. When a motion is made and supported as provided in this section, an adverse party may not rest upon the mere allegations, but shall serve and file in response a statement setting forth those material facts as to which he contends a genuine issue exists, supported by affidavits or otherwise. He may also submit a brief of points and authorities.

* * *

(e) Ruling on motion. The Administratove Law Judge shall grant a motion for summary disposition if the undisputed pleaded facts, affidavits, other verified statements, admissions,

stipulations, and depositions, and matters of official notice show that (1) there is no genuine issue as to any material fact, (2) there is no necessity that further facts be developed in the record, and (3) such party is entitled to a decision as a matter of law.

STATEMENT OF THE CASE

The petitioner ("Mr. Sundheimer") has been a commodities trader and floor broker for 20 years.

In the fall of 1974 Mr. Sundheimer passively acquiesced in his business associate's participation in certain prearranged crude oil futures trades at a time when crude oil futures were not regulated by the Commodities Exchange Act (the "Act"). After the transactions, the Act was amended (the "Amendment") to make it applicable to

crude oil futures effective April 21, 1975.

Income tax filings by others in respect of these transactions did constitute tax fraud, a subject over which the Commodity Futures Trading Commission (the "CFTC") obviously had no jurisdiction. Mr. Sundheimer cooperated with a criminal investigation of the transactions, testified against the principals and pleaded guilty to an information charging him generally with aiding and abetting false tax filings at various pleaded times, including times before and after the effective date of the Amendment. Mr. Sundheimer served the sentence imposed by United States District Judge Broderick.

Five years later the CFTC charged Mr. Sundheimer with an undifferentiated

panaoply of violations of the Act arising out of these transactions and obtained partial summary disposition on the grounds that Mr. Sundheimer's plea of guilty and plea allocution established that he had entered into prearranged trades in crude oil futures after the effective date of the Amendment. On appeal within the CFTC, the CFTC observed that a "prearranged trade" was not a per se violation of the Act, held that the proof did not establish market manipulation or fictitious sales but concluded that Mr. Sundheimer's acts were "tantamount to" accommodation trades, long prohibited by commodities regulatory acts but first applied to crude oil futures by the Amendment.

The plea allocution was ambiguous in establishing whether or not the

prearranged transactions occurred after the April 21, 1975 effective date of the Amendment. The initial transactions occurred in 1974. Mr. Sundheimer forthrightly acknowledged in his plea allocution that "implicit in the initial understanding" was a liquidating transaction. This acknowledgement was in response to Judge Broderick's inquiry about "consent to a similar arrangement for the following year." Mr. Sundheimer's acknowledgement does not acknowledge any transaction as late as April 21, 1975. This plea allocution was the sole evidence on which the CFTC granted summary disposition

The CFTC is required in cases where sanctions are imposed for criminal convictions to hold a hearing on the issues of mitigation and possible

rehabilitation. Mr. Sundheimer produced sixteen prominent witnesses who testified as to his good character and rehabilitation. Nevertheless, the CFTC rejected the uncontraverted evidence of his present good character and reliability and held that an insufficient passage of time for seven years precluded his establishing that he had been rehabilitated.

The CFTC permanently revoked Mr. Sundheimer's broker registration, imposed its maximum authorized penalty of $100,000 and prohibited Mr. Sundheimer for two years from trading in commodities futures contracts.

REASONS FOR GRANTING THE WRIT

I. THE DECISION ERRONEOUSLY EXPANDS THE STATUTORY TERM "ACCOMMODATION TRADES" TO ENCOMPASS NON-FICTITIOUS TRANSACTIONS.

Section 4C(a) of the Act, made applicable to crude oil futures only after April 21, 1975, prohibits any transaction which "is, is of the character of, or is commonly known to the trade as a[n] * * * 'accommodation trade'." The Act contains no definition of "accommodation trade".

All interpretive case law and CFTC definitions require that an "accommodation trade" be a fictitious transaction.* The CFTC properly held that

*In two isolated decisions, the Department of Agriculture [the CFTC's predecessor] used the term "accommodation trade" to mean a "wash" (meaning fictitious, in that there is no "actual change of ownership") trade to enable the opposite broker to offset his [footnote con't on next page]

the present transactions were not fictitious, because positions were actually taken in the market in

(footnote con't)

own customer's sales and purchases without detection. Irwin M. Eisen, 22 Agric. Dec. 758, 760 (1963); Julian M. Marks, 22 Agric. Dec. 761, 772 (1963).

In 1966, the CFTC's predecessor, the Commodity Exchange Authority, adhered to the requirement that the transaction be fictitious. Under this definition, "accommodation trading" meant:

"'wash trading entered into by one broker to assist another broker to make cross trades, wash trades***.'" CFTC v. Savage, 611 F.2d 270, 284 n.13 (9th Cir. 1979).

In 1979, the CFTC submitted a glossary to the Senate Committee on Agriculture, Nutrition and Forestry, and there again defined "accommodation trade", as

> "[w]ash trading entered into by a trader usually to assist another with illegal trades," 95th Cong. 2d Sess., Committee Print, Futures Trading Act of 1978, January 1979, p. 141, et seq.,

and "wash trading" as

> "[e]ntering into, or purporting to enter into transactions to give the appearance that purchases and sales

[footnote con't on next page]

connection with these transactions. The CFTC, acknowledging that these transactions were not "accommodation trades", held that they were "tantamount" to "accommodation trades".

The Second Circuit Court of Appeals, however, erroneously held that the subject transactions met the definition of "accommodation trade" and thereby expanded the jurisdiction of the CFTC.

II. THE DECISION PURPORTS TO PERMIT THE CFTC (AND OTHER FEDERAL AGENCIES) TO IMPOSE SANCTIONS FOR ACTS MERELY "TANTAMOUNT TO", BUT NOT ACTUALLY CONSTITUTING, A STATUTORY VIOLATION.

Acknowledging that the prohibited

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are being or have been made, usually not resulting in a change in the trader's market position." Id. at 164. Hence, under both the 1966 and 1979 definitions, an "accommodation trade" must be a fictitious trade.

practice ("accommodation trading" which must be fictitious trading) was not involved in the instant case, the CFTC nevertheless held Mr. Sundheimer's acts violative of §4C(a) because they were "tantamount to" such a violation. The Court of Appeals determined that this holding merely "involved an imprecise, and therefore objectionable, choice of language," but sustained the CFTC, because "it is apparent that the Commission equated the terms 'tantamount to' and 'of the character of." If this be the case, the CFTC was not entitled to do so, because the language "of the character of" is intended not to broaden the category of statutory violations, but rather to proscribe the specified act, whether or not the term used to describe it subsequently changes. See

CFTC v. Morgan, Harris & Scott, Ltd., 484 F.Supp. 669, 676 (S.D.N.Y. 1979). Cf. Precious Metals Assoc., Inc. v. CFTC, 620 F.2d 900, 906-908 (1st Cir. 1980).

1. Important Issue of Federal Law

The CFTC "may not bootstrap itself into an area in which it has no jurisdiction by *** violating its statutory mandate." Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973). See also, SEC v. Sloan, 436 U.S. 103 (1978). The "tantamount" holding, if sustained, would make 4C(a) "a solution to virtually any other problem which might occur in the market place." Sloan, supra, 436 U.S. at 117.

In Sloan, this Court rejected a similar attempt to broaden an agency's

remedial powers beyond that "clearly contemplated by" its enabling statute, stating "[w]e do not think [the section] * * * was meant to be such a cure-all." Id. Moreover, "had Congress intended the Commission to have the power * * * we expect that it could and would have authorized it more clearly." 436 U.S. at 122.

2. Conflict Among the Circuits

The Second Circuit's acquiescence to the CFTC's expansive interpretation of its enabling statute conflicts with the holdings of other Circuit Courts of Appeal.* Here, the Second Circuit

*An Agency's effort "to enlarge * * * the application of a statute should be subjected to close scrutiny," Celebrezze v. Kilborn, 322 F.2d 166, 168 (5th Cir. 1963), and the agency's order must be set aside "if the agency's underlying standards are not in accord with law," [footnote con't on next page]

stated that the CFTC did not "adhere to the language of the statutes they are enforcing" (5a), and yet inexplicably upheld the CFTC's order. In doing so, the Second Circuit adopted a far more

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Wheatley v. Adler, 407 F.2d 307, 310 (D.C. Cir. 1968), because "[a]n administrative decision based upon erroneous standards cannot stand," Kovac v. Immigration and Naturalization Serv., 407 F.2d 102, 104 (9th Cir. 1969). An agency whose holding "cannot be derived from the statutory language or from prior [agency] *** precedent" has acted "outside the law," IBEW v. NLRB, 487 F.2d 1143, 1171 (D.C. Cir, en blanc, 1973), cert. denied, 418 U.S. 902 (1974), and a court's obligation to defer to an agency's interpretation of its enabling statute "is limited by this court's obligation 'to honor the clear meaning of the statute, as revealed by its language, purpose, and history', [citing Daniel, supra, 439 U.S. at 566, n.20], and by the requirement that the agency interpretation not be clearly wrong or unreasonable." Coca-Cola Co. v. Atchison, T. & S.F. Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979).

lenient standard of review of a Federal Agency's independent expansion of its statutory authority than that employed by other circuits.

III. THE STATUTORY PROHIBITION OF "ACCOMMODATION TRADES" IS VOID FOR VAGUENESS UNDER THE UNITED STATES CONSTITUTION

In the instant case The CFTC has ascribed a meaning to the term "accommodation trade" different from that ascribed to it at any prior time: a trade in which actual positions were taken by both sides to the transaction. The term has had a fluid and expanding meaning over the years (see Point I, supra), which patently suggests that the term is unduly vague.* Indeed, the

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*Under the void-for-vagueness rule, vague or fluid terms, such as
[footnote con't on next page]

Senate Committee considering the 1974 enactment of the Act tacitly acknowledged that "accommodation trade" is a meaningless term, by declining to define it. The term is not defined in the Act, and only vaguely defined by CFTC case law and definitions. Where so defined, the term has been construed to require fictitious trading (see Point I, supra).

The Second Circuit nevertheless held that "there is no constitutional ambiguity in identifying an accommodation trade in these terms" a holding which conflicts with that of United States District Court for the Northern

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"accommodation trade" may not be used to identify the act which is prohibited. Grayned v. City of Rockford, 408 U.S. 104 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

District of Illinois in United States v. LaMantia, [1977-80 Transfer Binder] Comm.Fut.L.Rep. (CCH) ¶20,667 (N.D. Ill. 1978), which held the term "fictitious sale", a companion in §4C(a) to "accommodation trade", unconstitutionally vague, because, like the term "accommodation trade" as applied by the CFTC in the present case, it was not defined in the Act, there was no judicial construction of the term, the term did not appear in treatises on commodities and the definition sought by the government was not supported by the legislative history of the Act.

IV. THE DECISION PERMITS A FEDERAL AGENCY REVIEWING AN ADMINISTRATIVE LAW JUDGE DECISION TO CHANGE THE THEORY ON WHICH THE DEFENDANT IS CHARGED AND TO SUMMARILY IMPOSE HARSH SANCTIONS WITHOUT ANY PRIOR NOTICE.

Notice of charges is an essential

element of due process.* An agency may not impose sanctions without first giving the party to be sanctioned notice affording him the opportunity to oppose.**

*Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

**Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); NLRB v. Tennsco, 339 F.2d 396 (6th Cir. 1964); NLRB v. Johnson, 322 F.2d 216 (6th Cir. 1963), cert. denied, 376 U.S. 951 (1964). In Rodale Press, supra, the D.C. Circuit stated the rule which governs the present case as follows:

> "By substituting an issue *** for the one framed by the pleadings ***, the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [the Administrative Procedure Act] strikes is not remedied by observing that the outcome would perhaps or even likely be the same. It is the opportunity to present argument

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In the instant case, however, the CFTC complaint charged Mr. Sundheimer with market manipulation and, in the disjunctive and merely in the words of the statute, with possibly aiding and abetting one or another of seven additional separate acts prohibited by the Act. On motion for summary disposition, the Division of Enforcement claimed only that Petitioner had prearranged trades and manipulated ,

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(footnote con't)

> under the new theory of violation, which must be supplied." 407 F.2d at 1257.

Accord, National Realty & Constr. Co. Inc. v. OSHRC, 489 F. 2d 1257 (D.C. Cir. 1973); Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971); C&C Market, Inc. v. United States, 473 F.Supp. 519 (E.D. Mo. 1979). Thus, "one cannot be found guilty [by an Agency] of an offense not encompassed by the complaint or of which he had no fair notice." NLRB v. Tennsco, 339 F.2d 396, 399 (6th Cir. 1964).

markets. The ALJ held that petitioner had engaged in manipulation and fictitious sales.

On appeal, the CFTC rejected these holdings and conclusions, but nevertheless, without giving petitioner any notice that a new question was at issue, affirmed the ALJ decision because petitioner's acts were "tantamount to 'accommodation trades'". Mr. Sundheimer was first notified that he would be sanctioned summarily for engaging in activities "tantamount to accommodation trading" or for accommodation trading in the Order which imposed the sanctions. Mr. Sundheimer did not litigate the issue relating to acts "tantamount to accommodation trading" because he received no advance notice whatever that he was being charged with committing an

act "tantamount to" a violation of the Act.

Despite the foregoing, and despite the requisites of due process as established in other circuits, the Second Circuit held that the CFTC's actions comported with the Constitution.

V. THE DECISION SUSTAINS THE CFTC IN GRANTING SUMMARY DISPOSITION BASED UPON AMBIGUOUS EVIDENCE WHERE AN EVIDENTIARY HEARING SHOULD HAVE BEEN GRANTED.

The criminal information to which Mr. Sundheimer pled charged many overt acts and many possible times for the commission of the acts, some prior to the effective date of the Act and some subsequent to this date. The CFTC, of course, lacks authority to impose sanctions for acts which occurred prior to the effective date of the Act.

Where, as here, the commission of any of several acts referred to in the accusatory instrument would sustain the conviction, a general plea of guilty or conviction, without more, may not be used in another proceeding to establish under theories of collateral estoppel that any particular one of the acts charged actually occurred.* Here, a number of possible acts were charged as occuring either before or after the effective date of the Act purporting to

*Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Piper v. United States, 392 F.2d 462 (5th Cir. 1968); United States v. Fabric Garment Co., 366 F.2d 530 (2d Cir. 1966); United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959); United States v. Levinson, 369 F.Supp. 575 (E.D. Mich. 1973); United States v. American Packing Corp., 113 F.Sup. 223 (D. N.J. 1953). In Emich, supra, this Court stated the rule which governs the present as follows:

"***A general verdict *** does not

[footnote con't on next page]

prohibit only some of them, but all acts and dates need not have been proved for conviction. Accordingly, the guilty plea did not establish that any particular act was committed or that it was committed after April 21, 1975, the effective date of the Act.

Petitioner's plea allocution was equally ambiguous. While admitting that the transaction in which he acquiesced possibly entailed a subsequent correcting transaction in the year 1975,he did not in his plea statement

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(footnote con't)

> indicate which of the means charged in the indictment were found to have been used in effecutating the conspiracy. And since all of the acts charged need not be proved for conviction [citation omitted], such a verdit does not establish that defendants used all of the means or any particular one." 340 U.S. at 568-569.

indicate whether such a correcting transaction would have occurred after April 21, 1975, the effective date of the Act. Assuming arguendo that petitioner's plea statement was susceptible of interpretation as referring to a post-April 21, 1975 transaction, that is only one possible interpretation and establishes only that the statement is ambiguous. An ambiguous statement may not be used to create an estoppel.* Accordingly, petitioner's plea statement was insufficient as evidence for collateral

*Kauffman v. Moss, 420 F.2d 1270 (3rd Cir. 1970), cert. denied, 400 U.S. 846 (1970), Kelly v. Illinois Bell Tel. Co., 325 F.2d 148 (7th Cir. 1963). Cf. Northern Oil Co. Inc. v. Socony Mobil Oil Co., Inc., 368 F.2d 384 (2d Cir. 1966); McNellis v. First Fed. Sav. & Loan Ass'n, 364 F.2d 251 (2d Cir. 1966), cert. denied, 385 U.S. 970 (1966)

estoppel purposes to support summary judgment. Moreover, where there are substantial disputed facts as to the meaning of the plea and plea statement and the inferences to be drawn therefrom, summary judgment is improper.*

Despite the foregoing, and contrary to existing case law, the Court of Appeals held that summary judgment on the issue of petitioner's liability was proper and that the guilty plea to the multi-element information together with

*See, Poller v. Columbia Broadcasting Sys., 368 U.S. 464 (1962); Robertson v. Siedman & Siedman, 609 F.2d 583 (2d Cir. 1979); National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975); Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974).

ambiguous plea statement were sufficient to conclusively establish a post-April 21, 1975 violation.

VI. THE DECISION UPHOLDS THE CFTC'S NEW RULE THAT REHABILITATION CANNOT BE DEEMED TO HAVE OCCURRED UNLESS MORE THAN AT LEAST SEVEN YEARS HAVE ELAPSED.

The CFTC customarily receives evidence of mitigating circumstances and rehabilitation at a hearing prior to revoking the registration of a floor broker. During a three-day hearing, sixteen witnesses, including one of the prosecutors of the tax fraud case, gave substantial evidence on Mr. Sundheimer's behalf in support of his rehabilitation. The CFTC then rejected Mr. Sundheimer's claim of rehabilitation, because "rehabilitation in a case like this requires a much greater passage of

time before any such evidence can persuade us that rehabilitation has in fact occurred".

The rule requiring a minimum passage of time before rehabilitation may be found to have occurred was neither openly promulgated nor previously announced. By imposing the rule on petitioner seven years after the events complained of, the CFTC deprived the hearing on rehabilitation and mitigation of any meaning, and thus realistically denied him his right to a hearing.

CONCLUSION

The issues raised by the proceedings below are substantial. Federal agencies should be restrained from expanding their jurisdiction by reinterpreting statutory prohibitions or by prosecuting acts which are merely "tantamount to"

specified offenses. Ambiguous statutory provisions should not support substantial sanctions and forfeitures. Federal agencies should not deprive a person of his right to an evidentiary hearing on the basis of ambiguous evidence. Federal agencies should not dispense with vested rights to establish rehabilitation by resorting to an unpromulgated rule requiring passage of more than seven years for rehabilitation to occur.

The decision of the Second Circuit conflicts with the positions on these issues adopted by other Circuit Courts of Appeal and by this Court. The decision impacts broadly on the evolving regulatory scheme of an increasingly important nationwide industry. Moreover, the decision is a signal to other

federal agencies that conduct similar to that of the CFTC in the present proceeding will be condoned.

Accordingly, it is highly desirable that review be granted.

Respectfully submitted,

RICHARD M. PHILLIPS
Kirkpatrick, Lockhart, Hill, Christopher & Phillips
1900 M Street, N.W.
Washington, D.C. 20036

Of Counsel:

JOHN M. BURNS, III

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 581—August Term, 1981

(Argued December 10, 1981

Decided September 3, 1982)

Docket No. 81-4186

STEPHEN M. SUNDHEIMER,

Petitioner,

—v.—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

Before:

MOORE, TIMBERS and VAN GRAAFEILAND,

Circuit Judges.

Petition for review of an order of the Commodity Futures Trading Commission, which revoked petitioner's registration as a floor broker pursuant to §§ 8a(2)(B) & 8(a)(3) of the Commodity Exchange Act, as amended, 7

U.S.C. §§ 12a(2)(B) & 12(a)(3), held that petitioner had violated § 4c(a)(A), 7 U.S.C. §§ 6c(A), imposed a $100,000 penalty, ordered him to cease and desist from further violations of § 4c(a)(A), and prohibited him from trading on or subject to the rules of any contract market for a period of 24 months.

Petition for review denied and order affirmed.

JOHN M. BURNS III, New York, N.Y. (Burns & Fox, New York, N.Y., on the Brief), *for Petitioner.*

GLYNN L. MAYS, Assistant General Counsel, Commodity Futures Trading Commission, Washington, D.C., (Dennis A. Dutterer, General Counsel, Pat G. Nicolette, Deputy General Counsel, Gregory C. Glynn, Associate General Counsel, and Vivian C. Kresslein, Clerk, Washington, D.C., on the Brief), *for Respondent.*

VAN GRAAFEILAND, *Circuit Judge*:

Stephen M. Sundheimer (petitioner) asks this Court to review a final order of the Commodity Futures Trading Commission which revoked petitioner's registration as a floor broker and imposed other sanctions as provided in §§ 6(b) and (c) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9 & 13b. We affirm.

In 1974, petitioner, a vice-president of Pressner Trading Corporation, agreed that Pressner would take the other side of certain prearranged contracts in crude oil futures so that an oil company could obtain illegal tax benefits by claiming fraudulent losses. Some time later, the Justice Department commenced an investigation into the use of the crude oil futures market for tax evasion purposes. Petitioner was implicated and thereafter cooperated with the federal authorities.

On October 27, 1978, in the United States District Court for the Southern District of New York, petitioner pled guilty to a charge that he violated 26 U.S.C. § 7206(2) by knowingly aiding, assisting, and advising in the preparation of false and fraudulent income tax returns. On January 9, 1979, petitioner was sentenced to a year in prison and fined $5,000. The sentence of imprisonment was suspended on condition that petitioner devote the year to an approved community activity, which he did.

On January 16, 1979, the Commission's Division of Enforcement filed a complaint alleging that petitioner's felony conviction made him unfit for registration with the Commission. *See Commodity Exchange Act* §§ 8a(2)(B) & (3), 7 U.S.C. §§ 12a(2)(B) & (3). The complaint also alleged that petitioner had violated or aided and abetted violations of section 9(b) of the Commodity Exchange Act, 7 U.S.C. § 13(b), which forbids market price manipulations, and section 4c(a)(A), 7 U.S.C. § 6c(a)(A), which forbids conduct "of the character of" accommodation trades.

The Division of Enforcement moved for summary disposition, contending correctly that, because of petitioner's felony plea, he was collaterally estopped from denying his participation in the prearranged trades. The

Administrative Law Judge, to whom the matter was referred, held that, because petitioner's manipulation of prices did not end prior to April 21, 1975, when the Commission assumed jurisdiction over crude oil future contracts, the provisions of the Act were applicable to him. The Administrative Law Judge also held that a *prima facie* case of unfitness under section 8a(2)(B) had been made out and that both sections 9(b) and 4c(a)(A) had been violated. He granted in part the motion for summary disposition but ordered a hearing so that petitioner could introduce evidence of mitigating circumstances and rehabilitation.

Following the hearing, the Administrative Law Judge held that the evidence of mitigation was insubstantial and the claim of rehabilitation was premature. He suspended petitioner's registration as a floor broker for six months, enjoined him from further violations of the Act, suspended his trading privileges for twenty-four months, and fined him $200,000. On appeal, the Commission reversed the Administrative Law Judge's holding of a section 9(b) violation because petitioner's guilty plea did not encompass all the elements of market manipulation under the Commodity Exchange Act. The Commission held, however, that the transactions covered by the plea were "tantamount to" accommodation trades and violated section 4c(a)(A). The Commission concluded that petitioner's registration should be revoked rather than suspended, reduced the monetary penalty to $100,000, and approved the remaining sanctions.

Petitioner's principal contentions in this Court are that the Commission erred in finding a violation of section 4c(a)(A) and that the sanctions, as imposed, were improper.

The Section 4c(a)(A) Violation

The Commission's summary disposition of the charges against petitioner were based upon his guilty plea. The information to which petitioner pled guilty alleged that he, "together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years." We find no merit in petitioner's claim that he did not thus admit to engaging in any transactions after April 21, 1975, when, pursuant to the Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, 88 Stat. 1389, the newly-created Commission obtained jurisdiction over the crude oil futures market. The transactions charged and admitted went well beyond April, 1975, and summary disposition on the issue of liability therefore was proper.

The Commission's holding that the transactions in question violated section 4c(a)(A) because they were "tantamount to" accommodation trades involved an imprecise, and therefore objectionable, choice of language. Section 4c(a)(A) forbids transactions which are "of the character of" accommodation trades, and it is quite apparent that the Commission equated the terms "tantamount to" and "of the character of". However, the Commission would be well advised to adhere to the language of the statutes they are enforcing.

Petitioner contends, in any event, that the transactions were not of the character of accommodation trades, because, he says, an accommodation trade must be a fictitious transaction, not a real one. The Commission

defines "accommodation trading" as "[w]ash trading entered into by a trader, usually to assist another with illegal trades" and defines "wash trading" in turn as "[e]ntering into, or purporting to enter into, transactions to give the appearance that purchases or sales . . . have been made, usually not resulting in a change in the traders' market position." Committee on Agriculture, Nutrition and Forestry, 95th Cong. 2d Sess., Futures Trading Act of 1978, Glossary of Terms Used in Commodity Futures Trading (Comm. Print 1979). "The essential and identifying characteristic of a 'wash sale' seems to be the *intent* not to make genuine, bona fide trading transactions in stocks or commodities." *Commodity Futures Trading Commission v. Savage,* 611 F.2d 270, 284 (9th Cir. 1979) (quoting *In re Jean Goldwurm,* 7 Agric. Dec. 265, 274 (1948), with emphasis added). It is this intent, the absence of good-faith, arms-length trading, and the undisclosed prearrangement for losses and gains, that demonstrates the "accommodation" nature of the transactions in the instant case.

There is no unconstitutional ambiguity in identifying an accommodation trade in these terms. As a practical matter, *see Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied,* 406 U.S. 932 (1972), Pressner's prearranged transactions in the oil company's stock were accommodations for the oil company, criminally unlawful ones at that. That real sales rather than fictitious ones were contemplated does not change the artificial character of the arrangement. Prior administrative use of the term "accommodation trade" was consistent with this practical, everyday meaning. *See, e.g., In re Julian M. Marks,* 22 Agric. Dec. 761 (1963); *In re Irwin M. Eisen,* 22 Agric. Dec. 758, 759 (1963); *In re Julian M. Marks,* 20 Agric. Dec. 457, 458, 459 (1961).

The Sanctions

Although the sanctions imposed by the Commission were severe, apparently more severe than had been imposed in other cases, they were within statutory limits and constituted a proper exercise of the agency's discretion. *Haltmier v. Commodity Futures Trading Commission,* 554 F.2d 556, 563-64 (2d Cir. 1977); *see Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187 (1973). The only aspect of the Commission's holding that causes us concern is the arguably short shrift which the Commission gave petitioner's proof of rehabilitation.

It is established practice for the Commission to receive evidence of mitigating circumstances and rehabilitation. *See, e.g., In re Tipton* [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,673, at 22,750 (1978). During a three-day hearing, sixteen witnesses testified on petitioner's behalf. In rejecting petitioner's claim of rehabilitation, the Commission said "that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred." Petitioner contends that the Commission thus made the passage of time the determinative factor in the rejection, without giving due consideration to the evidence of rehabilitation.

If petitioner were correct in his construction of the Commission's language, we would be concerned that the Commission had abused its discretion. Time is, however, a relevant factor. The Commission may well be right if it believes that rehabilitation ordinarily does not occur overnight. On the other hand, if the Commission arbitrarily requires that a fixed period of time elapse before evidence of rehabilitation even will be considered, it actually is imposing a sentence in the guise of determining fitness for registration.

Although, once again, the Commission's choice of language leaves something to be desired, we are not persuaded that the Commission has any unpublished rule regarding the minimum passage of time. The Commission stated that it gave serious consideration to the evidence of rehabilitation, and we have no reason to disbelieve it. Petitioner may reapply, of course, for registration. *Silverman v. Commodity Futures Trading Commission,* 562 F.2d 432, 439 (7th Cir. 1977). Should the Executive Director reject petitioner's application without giving him a further hearing on the question of rehabilitation, *see* 17 C.F.R. § 3.20(e)(f), or should the Commission fail to give petitioner a fair hearing accompanied by proper consideration of all the evidence, petitioner's claim of prejudice may then be viewed in a different light. On the present record, we cannot say that the sanctions imposed constituted an abuse of discretion.

Finding petitioner's remaining claims of error to be without merit, we deny the petition for review and affirm the Commission's order.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

A.9

81-4186

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of October, one thousand nine hundred and eighty-two.

STEPHEN M. SUNDHEIMER,

Petitioner,

-v-

No. 81-4186

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioner, Stephen Sundheimer,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by:

Francis X. Gindhart

Francis X. Gindhart
Chief Deputy Clerk

A. 10

81-4186

To be argued by
JOHN M. BURNS, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

STEPHEN M. SUNDHEIMER,

Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,

Respondent.

ON PETITION FOR REVIEW FROM THE
COMMODITY FUTURES TRADING COMMISSION

MEMORANDUM ON BEHALF OF PETITIONER

BURNS & FOX
Attorneys for Petitioner
360 Lexington Avenue
New York, New York 10017
(212) 687-6290

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MEMORANDUM ON BEHALF OF PETITIONER

PRELIMINARY STATEMENT

This is a petition for review of a decision and order (the "Order," JA.8 et seq.,* reported at 2 Comm. Fut. L. Rep. (CCH) ¶21,245 (1981)) issued by the full Commodity Futures Trading Commission (the "CFTC") on September 16, 1981, as amplified by the CFTC's further order (the "Further Order," JA.22 et seq.) dated October 16, 1981. This Court has jurisdiction for this review because petitioner Stephen M. Sundheimer ("Mr. Sundheimer") was doing business in this Circuit. Section 6(b) ("§6(b)") of the Commodity Exchange Act, as amended (the "Act"), [7 U.S.C.A. §9].

ISSUES PRESENTED FOR REVIEW

The following substantial issues are presented for review:

(1) Whether a Federal Agency, on review of a decision by an Administrative Judge, may change the theory of the case and summarily impose harsh sanctions without giving the sanctioned party any prior notice that he is charged with the offense for which sanctions are imposed?

(2) Under a statute mandating a federal agency to hold an adjudicatory hearing prior to imposing sanctions:

(A) Whether a general plea of guilty to a single-count criminal information, containing many elements, any one of which would be sufficient to convict,

* References to the Joint Appendix shall be in the form "JA.__" herein.

establishes all elements charged in the information for collateral estoppel purposes sufficient to support summary judgment?

(B) Whether a party's pleading statement which is subject to a reasonable interpretation not admitting a statutory violation, establishes the commission of such violation sufficient to support summary judgment?

(C) Whether expert testimony is required to establish an alleged violation of a statute prohibiting acts "commonly known to the trade as" an "accommodation trade"?

(3) Whether a Federal Agency may impose harsh sanctions for an act not in violation of its statute or rule on the grounds that the act was "tantamount to" such a violation?

(4) Whether the term "accommodation trade", as prohibited by §4c(a) of the Act includes non-fictitious transactions?

(5) Whether the term "accommodation trade", as prohibited by §4c(a) of the Act and as applied to Petitioner, is void for vagueness under the United States Constitution?

(6) Whether a Federal Agency required to consider substantial evidence of mitigation and rehabilitation from a conviction for aiding or counselling an income tax violation behaves arbitrarily and capriciously in rejecting the evidence under a harsh new rule, announced with no prior notice and after the hearing, that rehabilitation cannot possibly occur in seven years?

(7) Whether a Federal Agency may impose harsh

sanctions without supporting them by adequate findings as to the need for such sanctions?

(8) Whether a Federal Agency may impose harsh sanctions which do not bear a reasonable relation to the purposes of its enabling statute?

(9) Whether a Federal Agency may impose harsh sanctions in a discriminatory manner?

STATEMENT

A. The Underlying Facts.

Mr. Sundheimer, a commodities trader and floor broker for twenty years (JA.537), was, and now is, vice president of Pressner Trading Corporation ("Pressner") (JA.530). Having earned an enviable reputation for integrity and efficiency in his industry, he marshalled impressive support at the CFTC proceedings below from leaders of the commodities industry who have serious vested interests in maintaining the integrity of the commodities market (See Point IV, infra).

In the fall of 1974 Mr. Sundheimer was in an office at Pressner when another Pressner officer, Jules Nordlicht ("Mr. Nordlicht"), discussed with Messrs. Turkish and Pearlmutter, who were not otherwise related to Pressner or Mr. Sundheimer, a proposed transaction in crude oil futures. Crude oil futures were not then subject to federal regulation.* Mr Sundheimer was not a member of the exchange upon which crude oil futures

* Crude oil futures became subject to regulation under the Act after April 21, 1975 when the Commodity Futures Trading Commission Act of 1974 expanded the definition of "commodity" in the Act to include all commodities (see JA.57, n 14; JA.15-16).

were traded (JA.530).

Mr. Nordlicht and the two others agreed that Pressner, as a customer, would accept one side of a certain prearranged crude oil futures trade to provide a tax benefit to one of Mr. Turkish's customers. The trade was to be executed by others, in the form of tax straddles, prior to the end of October, 1974, the tax year-end for one of the participants. A third party, Joseph R. Hamilton, whom Mr. Sundheimer detested and always scrupulously avoided (JA.531-2), was a major participant in the inactive crude oil futures market and had agreed with Mr. Turkish to prearrange these trades in this unregulated commodity (JA.532-3).

It was implicit that the loss side of the straddles would be liquidated prior to Mr. Turkish's customer's 1974 tax year-end and the profit side liquidated as early in 1975 as possible to avoid market fluctuation and a consequent imbalance between the 1974 loss and the 1975 gain (JA.15, n.7). Because he was in the room at the time, Mr. Sundheimer's assent was requested and he gave it (JA.533). Mr. Hamilton obviously did not control crude oil prices because Pressner profited on the transaction and returned the profit (JA.475).

When the Department of Justice commenced its investigation of Mr. Hamilton's and others' use of the crude oil futures market for tax evasion purposes, Mr. Sundheimer came forward before charges against him were imminent or pending (JA.227-8). He spent long hours, including evenings and weekends, helping the government make its cases (JA.230-1).

Mr. Sundheimer himself waived indictment (JA.67) and was charged in a one count information (the "Information") (JA.65)

(a) that he either "did aid, assist, procure, counsel and [or] advise * * *"

(b) the filing of either false tax "returns, affidavits, claims and [or] other documents * * *"

and that in furtherance of the offense he and others "fixed, rigged, and [or] fraudulently prearranged trades" in crude oil futures at unspecified times during 1974 and 1976. Any one item from paragraph "(a)" above coupled with any one fraudulently prearranged trade at any time prior to April 21, 1975, if an "(a)" - "(b)" combination existed, was sufficient to convict. Mr. Sundheimer pleaded guilty (JA.78).

Mr. Sundheimer's plea statement (JA.77) establishes why he pleaded guilty. He was contrite that he had been present and acquiesced when an agreement was made that Pressner accept the other side of a prearranged trade which afforded Mr. Turkish's customer a wrongful tax benefit. Implicit was a similar liquidating transaction in early 1975 (JA.77, 533-4, 15 n.7).

Mr. Sundheimer forthrightly acknowledged being present in the fall of 1974 when the arrangement was reached, agreeing to it and that "implicit in the initial understanding" was a liquidating transaction. Judge Broderick accepted this acknowledgment in response to his inquiry about "consent to a similar [either a liquidating or a new] arrangement for the following year" (JA.533-4, 77).

Judge Broderick sentenced Mr. Sundheimer to one year of community service and fined him $5,000 (JA.64) and Mr. Nordlicht, the active Pressner participant, to two years of such service and fined him $10,000 (JA.532).

Mr. Sundheimer performed his full time community service for the New York State Attorney General conscientiously and well (JA.258-9, 349-51). Mr. Sundheimer also accepted a one-year suspension from the Petroleum Associates of the New York Cotton Exchange, and paid it a $7,500 fine, and accepted a nine-month suspension from the New York Mercantile Exchange (JA.532).

B. The Proceedings Below.

Five years after the event, the CFTC's Division of Enforcement ("DE") commenced proceedings against Mr. Sundheimer

(a) Under Section 8a(3) [7 U.S.C.A. §12a(3)] of the Act ("§8a(3)") to revoke his floor broker registration on the ground of unfitness because of his conviction; and

(b) Under §6(b) for sanctions for aiding and abetting

(i) alleged price manipulation of crude oil futures, Section 9(b) [7 U.S.C.A. 13(b)] of the Act ("§9(b)"); and

(ii) a disjunctive panoply of seven possible alleged violations of Section 4c(a) [7 U.S.C.A. §6c(a)] of the Act ("§4c(a)"), including "accommodation trades" (JA.29).

The complaint did not allege, as the CFTC later decided, however.

that the subject transactions were "tantamount to" a violation (contrast the Complaint, JA.29, with the Order, JA.16, n.9).

DE moved for summary disposition solely upon Mr. Sundheimer's plea of guilty and his plea statement (JA.41-62), offering no expert testimony as to whether the act allegedly aided by Mr.Sundheimer was known to the trade as an "accommodation trade."* The Administrative Law Judge ("ALJ") awarded partial summary disposition in respect of the §6(b) claims. Sustaining the result, but not the ALJ's reasoning, the CFTC held that Mr. Sundheimer's guilty plea and plea statement established that Mr. Sundheimer had entered into prearranged trades in crude oil futures after April 21, 1975 when such futures first became subject to regulation (JA.14-15).

The CFTC accurately observed that a "prearranged trade", however, does not per se constitute a violation of the Act (JA.8, n.1),** and properly held that there was no proof that Mr. Sundheimer's acts constituted market manipulation under §9(b) (JA. 16-17) and that the transactions in question were not "fictitious sales" (JA.16, n.9) and, apparently, not "accommodations trades".

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* The statutory structure would appear to require such expert testimony. §4c(a). Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974); Randolph v. Collectramatic, Inc., 590 F.2d 844 (10th Cir. 1979). The CFTC frequently proffers expert testimony in analogous circumstances. See, e.g., CFTC v. Morgan, Harris & Scott, Ltd., 484 F. Supp. 669, 673 (S D.N.Y. 1979); CFTC v. Goldex Int'l Ltd , [1977-1980 Transfer Binder] Comm. Fut L. Rep. (CCH) ¶20,839 (N.D. Ill. 1979).

** Prearrangement is not a per se evil in the case of auction markets. For example, "Most transactions and 'block' programs in listed common stocks take the form of a series of relatively small transactions on the exchange auction market, or involve pre-arranged 'crosses' on the floor of an exchange." [Emphasis added] SEC: Special Study of Security Markets, reported in 3 Securities Regulation (Prentice Hall, 1979) ¶34,162.

Nevertheless, the CFTC held that the subject transactions were "tantamount to 'accommodation trades'" ("the Tantamount Holding", JA.16, n.9) and on that ground alone prohibited Sundheimer from trading on contract markets for two years, fined him $100,000 and ordered him to cease and desist from further violation of §4c(a) (the "§4c(a) Sanctions").*

The Tantamount Holding was strikingly inconsistent with the proceedings below.** The complaint did not charge that Mr. Sundheimer's acts were "tantamount to" a violation (JA.28,29). The DE's motion for summary disposition did not claim that Mr. Sundheimer's acts were accomodation trades, let alone "tantamount to" such trades (JA.41-62). Mr. Sundheimer's response to the motion, prepared by Kaye, Scholer, Fierman, Hays & Handler, evidences no awareness that any claim was made that the subject transactions were either accomodation trades or "tantamount to" such trades (JA.80-137). Faced with the ALJ's erroneous conclusions that the transaction was a manipulation and fictitious, the CFTC took over one year (JA.5 ¶¶ 57 and 58) from the time the appeal was submitted to conceive the Tantamount

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* Mr. Nordlicht, the active participant on behalf of Pressner, was prohibited from trading for three months, fined $75,000 and ordered to cease and desist (JA.532). In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980).

** The venality of DE's present practice of pleading all violations stated in the Act, disjunctively and merely as possibilities, is made eminently clear by this case, since no one apparently took the reference to "accommodation trading" seriously until the CFTC, needing a peg to hang its hat, seized on this camouflaged claim to justify sanctions, even though the Division had never claimed that the acts alleged were "tantamount to" a violation.

Holding and thereby impose sanctions without affording Mr. Sundheimer a hearing.

After a hearing limited to Mr. Sundheimer's mitigation and rehabilitation in respect of the §8a(3) charge for broker registration revocation and sanctions, at which sixteen prominent individuals testified for Mr. Sundheimer and none against (JA.160 et seq., see Point IV, infra), the CFTC held it would not consider this evidence, since rehabilitation requires "a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred * * * " (the "Seven Year Rule", (JA.19, n.13).* The Seven Year Rule is the CFTC's only stated ground for rejecting the impressive evidence of Mr. Sundheimer's rehabilitation and mitigation. Moreover, the CFTC acted under its harsh new rule that revocation was required where it has "any doubt," not just "reasonable doubt," as to the propriety of continued registration (JA.19, n.13). Under §§8a(3) and 6(b) the CFTC permanently revoked Mr. Sundheimer's floor broker registration.**

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* The Further Order clarifies that by this observation the CFTC referred to the time in the fall of 1974 of Mr. Sundheimer's "participation in the prearranged trading scheme" to the time "within the past few weeks [October 16, 1981] that the Commission has actually considered whether Mr. Sundheimer was rehabilitated * * * " (JA.24). That period is seven years

** Mr. Nordlicht's floor broker registration was revoked for only two years through February, 1982 with the understanding that he could reapply then and the subject events could not be the sole grounds to deny registration. In re Nordlicht, 2 Comm. Fut. L. Rep (CCH) ¶21027 (1980)

ARGUMENT

I

THE CFTC DENIED MR. SUNDHEIMER DUE PROCESS OF LAW AND FAILED TO OBSERVE PROCEDURES REQUIRED BY STATUTE IN IMPOSING THE §4c(a) SANCTIONS

The §4c(a) Sanctions are available only in the event of a violation of the Act, §6(b), and may not be imposed simply because of a criminal conviction. Indeed, a federal agency may not "poach on the jurisdiction entrusted solely to a federal district court" and impose sanctions for offenses not entrusted to it by its enabling statute. Steadman v. SEC, 603 F.2d 1126 (5th Cir. 1979), aff'd, ___ U.S. ___, 67 L.Ed.2d 69 (1981).

Each sanction curtails a valuable right protected by the Fifth Amendment to the Constitution ($100,000 of property, Mr. Sundheimer's right to pursue his profession of twenty years and his liberty to enter into contracts). United States v. Robel, 389 U.S. 258, 264 (1967); Greene v. McElroy, 360 U.S. 474, 492 (1959); West Coast Hotel v. Parrish, 300 U.S. 379, 391 (1937); Nebbia v. New York, 291 U.S. 502, 527 (1934); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 446 (2d Cir. 1980).

Mr. Sundheimer was deprived of due process because he was given no notice that the CFTC intended to ground its imposition of sanctions in the Tantamount Holding and he was denied his statutory right to a hearing by a summary disposition based on inconclusive evidence.

A. The CFTC Improperly Denied Mr. Sundheimer Notice of the Claim.

Notice of charges is an essential element of due process. Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

The complaint charged Mr. Sundheimer with market manipulation and, in the disjunctive and merely in the words of the statute, with possibly aiding and abetting one or another of seven* additional separate acts prohibited by the Act (JA.29). On motion for summary disposition, DE claimed only that Mr. Sundheimer had prearranged trades and manipulated markets (JA.42). The ALJ held that MR. Sundheimer had engaged in manipulation and fictitious sales (JA.159).

On appeal, the CFTC rejected these claims and conclusions and, without giving Mr. Sundheimer any notice that a new question was at issue, held that his acts were "tantamount to 'accommodation trades'" (JA.16, n.9). The first clue that Mr. Sundheimer would be sanctioned summarily either under the Tantamount Holding or for accommodation trading was given in the Order which imposed the sanctions.

The meaning of "accommodation trade" is vague (see Point II A, infra); the meaning of "tantamount to 'accommodation trades'" is even vaguer. The statutory scheme suggests, and elementary due process requires under the circumstances, that Mr. Sundheimer should have been given sufficient notice of his risks to permit him to present expert evidence and arguments to

* The seven are "wash sales, cross trades, accommodation trades or fictitious sales," §4(c)(a)(A), and reporting, registering or recording prices which are not bona fide, §4c(a)(C).

show that the subject transaction was not "of the character of or * * * commonly known to the trade as * * * accommodation trade", §4c(a), and its "tantamount". (See Point II(A), infra, for the argument why the transaction was not an accommodation trade or its tantamount.)

An agency may not impose sanctions without first giving the party to be sanctioned notice affording him the opportunity to oppose. Hess & Clark, Div. of Rhodia, Inc. v. FDA, 495 F.2d 975 (D.C. Cir. 1974); Golden Grain Macaroni Co. v. FTC, 472 F.2d 882 (9th Cir. 1972), cert. denied, 412 U.S. 918 (1973); Rodale Press, Inc. v. FTC, 407 F.2d 1252 (D.C. Cir. 1968); NLRB v. Tennsco, 339 F.2d 396 (6th Cir. 1964); NLRB v. Johnson, 322 F.2d 216 (6th Cir. 1963), cert. denied, 376 U.S. 951 (1964).

In Rodale Press, supra, the Court stated the rule which requires that the Order be vacated, as follows:

> "By substituting an issue * * * for the one framed by the pleadings * * *, the Commission has deprived petitioners of both notice and hearing on the substituted issue. The evil at which the statute [the Administrative Procedure Act] strikes is not remedied by observing that the outcome would perhaps or even likely have been the same. It is the opportunity to present argument under the new theory of violation, which must be supplied." 407 F.2d at 1257.

Accord, National Realty & Constr. Co. Inc. v. OSHRC, 489 F.2d 1957 (D.C. Cir. 1973); Bendix Corp. v. FTC, 450 F.2d 534 (6th Cir. 1971); C&C Market, Inc. v. United States 473 F Supp. 519 (E.D. Mo. 1979). In the present proceeding the claim relating to accommodation trades was camouflaged in the mult

element second count of the complaint and, even then, the CFTC substituted a new issue and held without a hearing that Mr. Sundheimer was guilty of an act not even pleaded.

In Johnson, supra, the Court denied enforcement to an NLRB order because the complaint had charged the respondent with refusing to reinstate former striking employees, but the trial examiner had rejected this charge and found the employer guilty of a discriminatory discharge which was not alleged in the complaint. The Court justified its holding on the ground that

> "one cannot be found guilty [by an agency] of an offense not encompassed by the complaint or of which he had no fair notice", 339 F.2d at 399,

because,

> "[t]he right of a defendant to know the issues in an adjudicatory proceeding * * * is a right and not a matter of grace." 339 F.2d at 400.

Accord, Golden Grain Macaroni, supra. The right to prior notice applies even to actions taken by an agency against an individual without an evidentiary hearing, Hess, supra, 495 F.2d at 983.

In Tennsco, supra, the court refused to enforce an order of the NLRB because the NLRB had buried two actual claims of discrimination in 66 claims of which it did not intend to prove 64. The court concluded that this camouflage deprived the defendant of notice of the actual claims against him

Here, no accurate statement of the actual claim (the "tantamount" claim) was made in the complaint; the distant relative of the actual claim was included in one count camouflaged by seven other specious claims. DR did not attempt to prove seven of these claims (including the claim relating to

accommodation trades) and it failed to prove the one it tried to prove (manipulation). The ALJ tried to find two claims (manipulation and fictitious sales) proved (again not including accommodation trading), but he erred in this endeavor.

Mr. Sundheimer did not litigate the issue relating to accommodation trades because it was not raised on the summary disposition motion or in the ALJ's decision. He did not litigate the Tantamount Holding because there was no suggeston whatsoever that he was charged with committing an act "tantamount to" a violation of the Act. Cf. Golden Grain Macaroni, supra.

Accordingly, it is clear that Mr. Sundheimer received no advance notice that he was charged with an act "tantamount to" an accommodation trade.

B. The CFTC Misinterpreted and Misconstrued the Slight Evidence.

The sole evidence upon which the CFTC based its determination that Mr. Sundheimer violated the Act after it became applicable to crude oil futures on April 21, 1975 is the CFTC's debatable inferences from Mr. Sundheimer's plea of guilty to the Information and the transcript of his statement at the time his plea was accepted. These documents do not separately or together support that determination. The evidence being documentary only, this Court may evaluate and weigh it as if receiving it in the first instance.*

* The "weight of evidence" question specified by §6(b) as the standard for review is whether there is "sufficient competent evidence" to support the CFTC's factual conclusion, Wiscone, S.A. v. CFTC, 604 F.2d 764, 767 (2d Cir. 1979). In making the determination, the standard of review is whether the "preponderence' or 'greater weight of the evidence'" after "something (continued)

(i) The Mere Fact of Mr. Sundheimer's Plea Does Not Establish the Commission of Any Act Prohibited By the Act or That Any Act Occurred After April 21, 1975.

Where, as here, the commission of any of several acts referred to in the accusatory instrument would sustain the conviction, a general plea of guilty* or conviction, without more, may not be used in another proceeding to establish under theories of collateral estoppel that any particular one of the acts charged actually occurred. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951); Piper v. United States, 392 F.2d 462 (5th Cir. 1968); United States v. Fabric Garment Co., 366 F.2d 530 (2d Cir. 1966); United States v. Guzzone, 273 F.2d 121 (2d Cir. 1959); United States v. Levinson, 369 F.Supp. 575 (E.D. Mich. 1973); United States v. American Packing Corp., 113 F.Supp. 223 (D.N.J. 1953).

In Emich, supra, the Supreme Court stated the rule which governs the present appeal as follows:

> "* * * a prior criminal conviction may work an estoppel in favor of the Government in a subsequent criminal proceeding [citations omitted]. Such estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution [citations omitted].

Footnote cont'd:
other than * * * mechanically reweighing the evidence'" for the "'purpose of determining whether the finder of the fact was justified, i.e. acted reasonably, in concluding that the evidence * * * the reasonable inferences drawn therefrom and other pertinent circumstances, supported his findings ' [Citations omitted] " Haltmier v CFTC, 554 F 2d 556, 560 (2d Cir. 1977)

* Indeed, there is a persuasive argument that a plea of guilty should be entitled to substantially less weight in establishing an estoppel than should a conviction. 1B Moore's Federal Practice, ¶0.413 at 2707-8

> "* * * A general verdict * * * does not indicate which of the means charged in the indictment were found to have been used in effectuating the conspiracy. And since all of the acts charged need not be proved for conviction [citation omitted], such a verdict does not establish that defendants used all of the means or any particular one." 340 U.S. at 568-9.

Here a number of possible acts were charged as occurring both before and after the effective date of the Act purporting to prohibit only some of them, but all acts and dates need not have been proved for conviction. Accordingly, the plea itself did not establish that any particular act was committed or that it was committed after April 21, 1975, the effective date of the Act.

Following Emich many courts have held in multi-overt act situations similar to the present one that a collateral estoppel is not established by a conviction. In Guzzone, supra, this Court held that conviction under a conspiracy charge did not establish any of the overt acts charged except the one as to which testimony was introduced at trial. In American Packing, supra, the court held that a plea of guilty to a conspiracy charge did not establish any overt act alleged since the

> "* * * overt act may be one charged in the indictment, or it may merely be any overt act which has as its purpose the effectuation of the objects of the conspiracy." 113 F.Supp. at 225.

In Levinson, supra, the court held that a general verdict of guilty to a conspiracy charge did not establish the commission of any of the many overt acts charged.

The rule against an estoppel in the present proceeding is not limited to conspiracy cases. In Fabric Garment, supra, this Court held that conviction on a charge of converting approximately 19,000 yards of serge, while creating an estoppel as to the fact of conversion, did not estop as to the quantity since the quantity was not an essential element of the charge. In Piper, supra, the court held that a conviction for filing false excise tax returns in a pleaded amount did not create an estoppel as to the amount of tax due since the "correctness of the Government's assessment was not necessary to convict * * *." 392 F.2d at 464.

Thus, since many acts and many possible times for those acts were alleged in the Information, Mr. Sundheimer's plea of guilty to the multi-element, single count, Information did not itself establish that any particular one of the acts charged in the Information actually occurred at any particular time.

(ii) Mr. Sundheimer's Plea Statment Does Not Establish Any Act Prohibited By the Act or that Any Act Occurred After April 21, 1975.

Mr. Sundheimer's statement that "implicit in" his assent to the pre-October 31, 1974 transaction was assent to the post-October 31, 1974 liquidating transaction does not establish either a violation of the Act or any act occurring after April 21, 1975. The CFTC recognizes that a tax straddle requires a liquidating transaction promptly in the subsequent year (JA.15, n. 7), but the CFTC summarily rejected the logical conclusion that Mr. Sundheimer referred to an early 1975 liquidating transaction without stating any basis for doing so.

Assuming arguendo that Mr. Sundheimer's plea statement were susceptible of interpretation as referring to a post April 21, 1975 transaction, that is only one possible interpretation and establishes only that the statement is ambiguous. An ambiguous statement may not be used to create an estoppel. Kaufman v. Moss, 420 F.2d 1270 (3rd Cir.), cert. denied, 400 U.S. 846 (1970); Kelly v. Illinois Bell Tel. Co., 325 F.2d 148 (7th Cir. 1963); cf. Northern Oil Co. Inc. v. Socony Mobil Oil Co., Inc., 368 F.2d 384 (2d Cir. 1966); McNellis v. First Fed Sav. & Loan Ass'n, 364 F.2d 251 (2d Cir.), cert. denied, 385 U.S. 970 (1966)

In Kaufman, supra, the court stated the rule which governs the present appeal as follows:

> "Reasonable doubt as to what was decided by a prior [criminal] judgment should be resolved against using it as an estoppel." 420 F.2d at 1274.

In Kelly, supra, the court held that a jury verdict in a criminal case could not be used to create an estoppel where it was

> "equally susceptible of diametrically opposed inferences with respect to the basic issue here ***." 325 F.2d at 152.

In Northern Oil and McNellis, supra, this Court applied the same rule to civil judgments, holding that an ambiguity as to what was determined prevented the use of the judgment for collateral estoppel purposes. Even in the case of an unambiguous plea, extraneous circumstances such as the prosecutor's post-conviction admission that he could not have proved all of the elements of an indictment precludes collateral estoppel to establish the elements the prosecutor could not have proved. De Cavalcante v. Commissioner, 620 F 2d 23 (3d Cir. 1980).

Mr. Sundheimer's mere plea to a multi-element criminal income tax Information, any of which elements would support a conviction, and reference to Mr. Sundheimer's plea statement fail to establish by collateral estoppel either an act which would constitute a violation of the Act or that any act complained of was committed after the effective date of the Act. Accordingly, there was insufficient competent evidence to support the CFTC's determination that Mr. Sundheimer violated the Act.

C. The CFTC Improperly Sustained Summary Disposition and Thereby Wrongfully Deprived Mr. Sundheimer of His Statutory Right to any Adjudicatory Hearing.

CFTC hearings are required by §§6(b) and 8a before the CFTC may impose §4c(a) sanctions. The right to a meaningful evidentiary hearing is also an essential requirement of due process. Goldberg v. Kelly, 397 U.S. 254 (1970). Here, partial summary disposition was granted denying Mr. Sundheimer an adjudicatory hearing on every issue arising under §4c(a).

Summary disposition on the §4c(a) claim was granted despite the absence of any dispositive, unequivocal evidence that any act prohibited by the Act was committed, that any subject transaction occurred after April 21, 1975, that any act committed constituted an accommodation trade or that any such act was "tantamount to" an accommodation trade.

Absent dispositive, unequivocal evidence that the Act was violated, the CFTC lacked authority to grant summary disposition and deprive Mr. Sundheimer of his statutory adjudicatory hearing. United States v. Choramie Bo-Truc #5, Inc., 538 F.2d 696 (5th Cir. 1976), Independent Bankers Ass'n. v. Board

of Governors of the Fed. Reserve Sys., 516 F.2d 1206 (D.C. Cir. 1975); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975).

Since formalities of pleadings and rules of evidence are more relaxed in agency proceedings, an agency "carries a heavy burden of justification", Independent Bankers, supra, 516 F.2d at 1220, in denying a party his statutorily prescribed adjudicatory hearing and such denial "is justified only in exceptional circumstances." Id., n.57. "[T]he agency must show that the parties could gain nothing", Id., by an adjudicatory hearing and

> "[a] petitioner need not make detailed factual allegations in order to meet the requirement that he raise 'issues of material fact.' He need only show that an 'inquiry in depth' is appropriate.' Id., n.57.

See also Cheramie Bo-Truc, supra.

Agency summary disposition motions are analogous to summary judgment motions, Independent Bankers, supra, 516 F.2d at 1220, n.57. The DE did not make a sufficient showing of non-disputed material facts to entitle it to summary judgment. Poller v. Columbia Broadcasting Sys., 368 U S. 464 (1962); United States v. Diebold, Inc., 369 U.S. 654 (1962); Robertson v. Siedman & Seidman, 609 F.2d 583 (2d Cir. 1979); National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023 (D.C. Cir. 1978); United States v. Pent-R-Books, Inc., 538 F.2d 519 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317 (2d Cir. 1975); Patagonia Corp. v. Board of Governors of the Fed. Reserve Sys., 517 F.2d 803 (9th Cir. 1975);

Henderson Trumbull Supply Corp. v. NLRB, 501 F.2d 1224 (2d Cir. 1974); United States v. J. B. Williams Co., Inc., 498 F.2d 414 (2d Cir. 1974); Empire Electronics Co., Inc. v. United States. 311 F.2d 175 (2d Cir. 1962); Doe v. United States Civil Serv. Comm'n, 483 F.Supp. 539 (S.D.N.Y. 1980); Wessinger v. Southern Ry. Co., Inc., 438 F.Supp. 1256 (D.S.C. 1977); Fuller Brush Co. v. United States, 262 F.Supp. 989 (D. Conn. 1966); A. Smith Bowman & Sons, Inc. v. Schenley Distillers, Inc., 190 F.Supp. 586 (D. Del. 1961).

In Henderson, supra, this court remanded the matter for a hearing where the "reasonably probably interpretations" of a certain statement were, as here, the opposite of the interpretation assumed by the agency. 501 F.2d at 1230. In Patagonia, supra, the court stated the rule applicable on the present review as follows:

> "Disputed questions of adjudicative fact normally are not decided without affording to the party that may be adversely affected as evidentiary hearing in which that party has the opportunity to confront witnesses and to hear and contest the evidence against him." 517 F.2d at 816.

Summary judgment is an issue finding, and not an issue determining procedure. Thus, the Supreme Court has established strict requirements for a summary disposition of any adjudicatory matter stating that summary judgment is to be granted

> "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial * * * if they really have issues to try.'" Poller, supra, 368 U.S.

> at 468, quoting from Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944) [Excisions, except as marked by "***", and bracket insertions by the Court.]

Where, as here, it was not "quite clear what the truth is" and at least three "genuine issue[s] remain for trial," it was inappropriate to grant summary disposition. The rule against summary disposition is applicable even absent the right to jury trial. J.B. Williams, supra, 498 F.2d at 430, n.19.

Courts have consistently held that "on motion for summary judgment the court cannot try issues of fact; it can only determine whether there are issues to be tried." Heyman, supra, 524 F.2d at 1319-20, and cases cited therein. As stated in Campbell, supra,

> "Summary judgment is unavailable if it depends upon any fact that the record leaves susceptible of dispute." [Emphasis added] 593 F.2d at 1027.

The right to summary judgment must be established

> "with such clarity as to leave no room for controversy". [Emphasis added.] Traylor v. Black, Sivalls & Bryson, Inc., 189 F.2d 213, 216 (8th Cir. 1951). Accord, Campbell, supra, 593 F.2d at 1027; Seaman v. Mumford, 335 F.2d 704, 705 (D.C. Cir. 1964). See also Wessinger, supra, 438 F.Supp. at 1259.

If there is "any" or the "slightest doubt," the motion must be denied, Doehler Metal Furniture Co., Inc. v. United States, 149 F.2d 130, 135 (2d Cir. 1945); Doglow v. Anderson, 438 F.2d 825, 830 (2d Cir. 1971); Wessinger, supra, 438 F.Supp. at 1259, and, of course, the evidence in the record must be "viewed in the light most favorable to the party opposing the motion". Diebold, supra, 369 U.S. at 655.

Moreover, in a case such as the present one based en-

tirely upon the CFTC's debatable inferences drawn from the ambiguous plea and plea statment, summary disposition must be denied because,

> "the inferences to be drawn from the underlying facts contained in such materials [affidavits exhibits and depositions] must be viewed in the light most favorable to the party opposing the motion". Diebold, supra, 369 U.S. at 655,

and

> "[w]hen conflicting inferences can be drawn from the facts, however, summary judgment is inappropriate." Robertson, supra, 609 F.2d at 591.

As stated in Empire, supra, the evidence must be viewed, "giving the opponent [on summary disposition] the benefit of all favorable inferences that may reasonably be drawn," 311 F.2d at 180, and

> "'[i]f, when so viewed, reasonable men might reach different conclusions, the motion should be denied and the case tried on its merits.'" Empire, supra, 311 F.2d at 180, quoting from Ramsouer v. Midland Valley R. Co., 135 F.2d 101,106 (8th Cir. 1943).

Indeed, inferences must be viewed in favor of the party opposing summary judgment even though the party's "prospect of ultimate success on the merits might be viewed as small." Dolgow, supra, 438 F.2d at 830. As stated in Wessinger, supra,

> "'Neither should summary judgment be granted if the evidence is such that conflicting inferences may be drawn therefrom * * *'" 436 F.Supp. 1259, quoting from Phoenix Sav. and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245, 249 (4th Cir. 1967). See also Doe, supra, 483 F.Supp. at 555.

Here, the sole evidence to support summary disposition was the ambiguous plea and the ambiguous plea statment and the

debatable inferences the CFTC chose to draw from these facts. Nothing dispositively and unequivocally established any act prohibited by the Act or that any such act occurred after the effective date of the Act or that the act could have been an accommodation trade or its "tantamount". Under these circumstances, the CFTC could not properly grant summary disposition and deny Mr. Sundheimer his statutory hearing, because

> "the moving party [must] show, on the basis of admissible evidence * * * that 'there is no genuine issue as to any material fact' [citations omitted]. Where this initial showing is not made, summary judgment will be denied, even though the party opposing the motion has submitted no probative evidence to support its position or to establish that there is a genuine issue for trial', Pent-R-Books, supra, 538 F.2d at 529,

and

> "[f]acts not conclusively demonstrated, but essential to the movant's claim, are not established merely by his opponent's silence", Campbell, supra, 593 F.2d at 1027,

and the CTFC's

> "surmise, however, plausible on its face, cannot substitute for full-bodied proof." Campbell, supra, 593 F.2d at 1028.

The prohibition against summary disposition on slight ambiguous evidence is especially strong in a case such as the present one where the meaning or effect or words or acts are in dispute, J. B. Williams, supra, 408 F.2d at 431, or where an inquiry into the facts may be desired to clarify applicable law. Wessinger, supra, 438 F.Supp. at 1256; Smith Bowman, supra, 190 F.Supp. at 588-9.

There being substantial disputed facts as to the meaning of the plea and plea statement and the inferences to be drawn therefrom and there being no evidence whatsoever as to the meaning of "accommodation trade" or the facts and reasoning underlying the Tantamount Holding, summary disposition was clearly improperly granted.

II

THE CFTC EXCEEDED ITS STATUTORY JURISDICTION AND AUTHORITY BY IMPOSING SANCTIONS GROUNDED IN THE TANTAMOUNT HOLDING

The CFTC is authorized to impose the §4c(a) sanctions only upon a proper finding of a violation of the Act. §6(b). Here the CFTC did not find a violation of the Act, but only something "tantamount to" a violation.* Tantamount does not mean "the same as" or "identical with". Some event or thing which is "tantamount to" a term used in a statute does not make the statute applicable to that event or thing. Trotz v. Commissioner, 361 F.2d 927, 929 (10th Cir. 1966).

In reaching the Tantamount Holding the CFTC announced its intention to impose its severest sanctions in the strictest form against those who act in any manner of which the CFTC does not approve, whether or not Congress so authorized. When com-

* The requirement of §10(e) (2) (C) of the Administrative Procedure Act [5 U.S.C.A. §706(2)(C)] that this Court "shall *** set aside agency action *** found to be *** in excess of statutory jurisdiction, authority, or limitations ***" is applicable to CFTC action. Wiscope S.A. v. CFTC, 604 F.2d 764 (2d Cir. 1979); British Am. Commodity Options Corp. v. Bagley, 552 F.2d 482, 490 n.12 (2d Cir. 1977), cert. denied, 434 U.S. 938 (1977).

itted, Mr. Sundheimer's acts violated only one law, the federal criminal law, and under that system Mr. Sundheimer has already paid his full penalty.

The impact of the Tantamount Holding upon Mr. Sundheimer is substantial. He is denied his liberty to enter into contracts. He must pay a substantial fine. His registration as a floor broker is revoked. He is expelled from the business in which he has made a living for 20 years.

The impact upon others engaged in the same business is equally offensive. The industry is now subject to the whim of the CFTC. The CFTC may one week approve, the next week condone and the following week condemn and impose sanctions for any act which it may loosely characterize as "tantamount to" something which is prohibited by the Act. Regulatory predictability and the ability to plan one's affairs within the context of specific rules are abolished.

The impact upon the United States Constitution system is even more venal. How can a court review any disciplinary or exclusionary act of any agency if the Tantamount Holding is sustained?

As is set forth more fully immediately hereinafter, (a) Mr. Sundheimer's acts do not constitute accommodation trades or anything remotely similar to them, and (b) the CFTC may not expand its jurisdiction to include the imposition of sanctions for things "tantamount to" specific violations of the Act.

A. Mr. Sundheimer's Acts Do Not Constitute "Accommodation Trading."

Section 4c(a) was originally enacted in haec verba in 1936, Ch. 545 of the laws of 1936, §5, 49 Stat. 1494, but did not become applicable to crude oil futures until April 21, 1975. Section 4c(a) prohibits any transaction which "is, is of the character of [*], or is commonly known to the trade as, a * * * 'accommodation trade'", without further definition of the phrase "accommodation trade".

At the time the section was originally enacted, Senator Pope, spokesman for the bill, twice advised the Senate that

> "[a]n accommodation trade is a transaction between two commission houses whereby, one being long with the clearing house and the other being short, the one that is long sells to the one that is short enough of a given future[s] to give each house an even or nearly even position, thus reducing the amount of [the] margin to be put up with the clearing house." 80 Cong. Rec. 6162 and 8088 (1936). (See Addendum to Memorandum on Behalf of Petitioner herein, the "Addendum," submitted herewith, at pp.16-18.)

There are no other definitions in the section's legislative history. Clearly the acts charged against Mr. Sundheimer do not fit within this definition. Under usual standards of statutory construction, the definition before Congress at the time of enactment, a fictitious trade to circumvent margin requirements, is the only acceptable definition. Cf. Litchfield Sec. Corp. v United States, 325 F.2d 667-73 (2d Cir. 1963).

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*The language, "of the character of" is intended to proscribe the specified act whether or not the term used to describe it subsequently changes. See CFTC v. Morgan, Harris & Scott, Ltd., 484 F Supp 669, 676 (S.D N.Y. 1979); cf. Precious Metals Assoc v. CFTC, 620 F.2d 900, 906 8 (1st Cir. 1980).

Substantially subsequent to enactment of this section, in two isolated decisions the Department of Agriculture used the term "accommodation trade" to mean a "wash" (meaning fictitious, in that there is no "actual change of ownership") trade to enable the opposite broker to offset his own customer's sales and purchases without detection, Irwin M. Eisen, 22 Agric. Dec. 758, 760 (1963), Julian M. Marks, 22 Agric. Dec. 761, 772 (1963). Since the CFTC has properly held that the transactions involved in this proceeding were not fictitious (JA. 16, n.9), this definition does not apply to Mr. Sundheimer.

In 1966, the CFTC's predecessor, the Commodity Exchange Authority, informally attempted to broaden the definition of "accommodation trading" to mean:

> "'wash trading entered into by one broker to assist another broker to make cross trades, wash trades * * *.'"* CFTC v. Savage, 611 F.2d 270, 284 n.13 (9th Cir. 1979).

A wash trade is a fictitious trade. Savage, supra, 611 F.2d at 284 n.13. Hence, under the 1966 definition, an accomodation trade must be a fictitious trade. Accordingly, by definition, the subject transaction cannot be an "accommodation trade" within the meaning of the 1966 definition.

Under this 1966 definition, to be an accommodation trade, the transaction must also be in aid of a cross trade or a wash trade. A "cross trade" is (a) an indirect bucketing**

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* The omitted phrase is merely "etc.". (See Addendum at p.33.)

** "Bucketing" is "[d]irectly or indirectly taking the opposite side of a customer's order * * *." S. Rep. No. 93-1131, 93d Cong., 2d Sess. Appendix IX, reprinted in [1974] U.S. Code Cong. & Ad. News 5891. (Addendum at p.20.)

transaction, (b) an offset of one customer's order against another's, or (c) a specific type of wash trade (fictitious trade). Id.

The CFTC properly held that the transactions which are the subject of the present proceeding were not fictitious, because positions were actually taken in the market in connection with these transactions (JA.16 n.9), and no claim was made of bucketing.

Accordingly, for the additional reason that neither fictitious nor cross trades were aided by Mr. Sundheimer's acts, Mr. Sundheimer's acts by any authoritative definition do not constitute accommodation trades within the meaning of the 1966 definition.

In connection with the 1974 enactment of the Act, the Senate Committee prepared a "Glossary of Terms Used in Commodity Futures Trading." S. Rep. No. 93-1131, 93d Cong., 2d Sess. Appendix IX, reprinted in [1974] U.S. Code Cong. & Ad. News 5891. The glossary defines "wash trading" ("accommodation trade's" companion in §4c(a)) consistently with the foregoing, but the lexicographers dared not attempt to define "accommodation trade".

In 1979 the CFTC submitted a glossary to the Senate Committee on Agriculture, Nutrition and Forestry under a caveat that

> "[i]t is not, under any circumstances, to be deemed a set of legal definitions, nor a guide to interpretation of the Commodity Exchange Act." 95th Cong. 2d Sess., Committee Print, Futures Trading Act of 1978, January 1979, p.141 et seq. (Addendum at pp.24-32.)

That glossary defined "accommodation trade" as

> "[w]ash trading entered into by a trader, usually to assist another with illegal trades", id.

and "Wash Trading" as

> "[e]ntering into, or purporting to enter into transactions to give the appearance that purchases and sales are being or have been made, usually not resulting in a change in the trader's market position", id. at 164,

again repeating the requirement that an "accommodation trade" be fictitious, which the CFTC has properly held is not the present case. Interestingly, the glossary identifies "cross trade" and "wash sales" (companions of "accommodation trade" and "fictitious sales" in §4c(a)) as acts prohibited by the Act, but does not so identify "accommodation trade" or "fictitious sale", which latter term has been held to be unconstitutionally vague (see infra, Point II).

There being no other authoritative definitions of "accommodation trade", and it being clear both logically and from the CFTC's own determination to use the word "tantamount" that the acts charged against Mr. Sundheimer do not constitute accommodation trades, it follows that Mr. Sundheimer did not violate the Act.

B. The CFTC May Not Impose Sanctions for Behavior Which is Not Prohibited by the Act

In the Tantamount Holding the CFTC purports to extend its authority to impose sanctions against persons who engage in conduct which the CFTC considers to be "tantamount to" an act prohibited by the Act. In so doing, the CFTC has clearly exceeded its statutory mandate

Despite the deference to be afforded the CFTC in respect of its interpretation of the Act which empowers it,* the CFTC "may not bootstrap itself [as here attempted] into an area in which it has no jurisdiction by * * * violating its statutory mandate." Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 745 (1973). See also SEC v. Sloan, 436 U.S. 103 (1978).

In the Tantamount Holding the CFTC overstepped the

> "limits, grounded in the language, purpose, and history of the particular statute, on how far an agency properly may go in its interpretative role." International Bhd. of Teamsters v. Daniel, 439 U.S. 551, 566 (1979).

The language of §4c(a) prohibits accommodation trades**-- trades currently held to be fictitious trades entered into to enable others to enter into fictitious trades or to bucket or offset customer's orders, and earlier at the time of enactment held to be those entered into to avoid margin requirements. It does not prohibit any act alleged against Mr. Sundheimer.

The Tantamount Holding, if sustained, would make §4c(a)

> "a solution to virtually any other problem which might occur in the marketplace." Sloan, supra, 436 U.S. at 117.

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* There are limits to such deference. See, e.g., Judge Feinberg's analysis in In re Chin Thloot Har Wong, 224 F.Supp. 155, 164-165 (S.D.N.Y. 1963).

** Even the most cursory review of the Act discloses that the prohibition against "accommodation trades" was directed against a specific practice. Contrast the broad general language used by the Congress in prohibiting fraud (Act, §4b(A) [7 U.S.C.A. §6b(A)]) and market price manipulation (Act, §6(b) [7 U.S.C.A. §9]) in accordance with the Congressional purpose. See Act, §3 [7 U.S.C.A. §5] Where, as here, the acts complained of do not fall within the broadly defined categories of fraud or manipulation, the CFTC cannot be permitted simply to redefine the specific prohibitions and expand its jurisdiction to suit its supposed needs.

As the Supreme Court stated in Sloan, supra, rejecting a similar attempt by the Securities and Exchange Commission to broaden its remedial powers beyond that "clearly contemplated by" its enabling statute,

> "[w]e do not think [the section] * * * was meant to be such a cure-all." Id.

Moreover,

> "had Congress intended the Commission to have the power * * * we expect that it could and would have authorized it more clearly * * *." 436 U.S. at 122.

The CFTC's present effort "to enlarge * * * the application of a statute should be subjected to close scrutiny", Celebrezze v. Kilborn, 322 F.2d 166, 168 (5th Cir. 1963), and the Order must be set aside "if the agency's underlying standards are not in accord with law", Wheatley v. Adler, 407 F.2d 307, 310 (D.C. Cir. 1968), because "[a]n administrative decision based upon erroneous standards cannot stand." Kovac v. Immigration and Naturalization Serv., 407 F.2d 102, 104 (9th Cir. 1969).

Since the Tantamount Holding "cannot be derived from the statutory language or from prior [Commission] * * * precedent", it is clear that the CFTC has acted "outside the law", IBEW v. NLRB, 487 F.2d 1143, 1171 (D.C. Cir., en banc, 1973), cert. denied, 418 U.S. 902 (1974), and this court's obligation to defer to the CFTC's interpretation of the Act "is limited by this court's obligation 'to honor the clear meaning of the statute, as revealed by its language, purpose, and history', [citing Daniel, supra, 439 U.S. at 566, n.20] and by the requirement that the agency interpretation not be clearly wrong or unreasonable." Coca-Cola Co. v. Atchison, T. & S.F. Ry. Co., 608 F.2d 213, 222 (5th Cir. 1979).

As stated by the Supreme Court in SEC v. Chenery Corp., 318 U.S. 80, 94 (1943).

> "an order may not stand if the agency has misconceived the law."

Here the CFTC has interpreted the Act as outlawing or applying to behavior which the Act does not proscribe. Accordingly, the order is overbroad and reflects an undue enlargement of the CFTC's authority beyond that granted by Congress.

Since Mr. Sundheimer's acts do not constitute accommodation trades or any other behavior prohibited under the Act, and since the Order is therefore beyond the authority of the CFTC, the Order should be vacated on that ground alone to the extent that it imposes §4c(a) Sanctions upon Mr. Sundheimer.

III

AS APPLIED TO MR. SUNDHEIMER, THE PROHIBITION OF "ACCOMMODATION TRADES" IS UNCONSTITUTIONALLY VAGUE

If "accommodation trade" as used in §4c(a) has any meaning, it should be the meaning ascribed to it at the time of enactment of §4c(a) (see supra, Point I(C)(i)). Here, the Commission has attempted to ascribe to it a meaning which it has never had at any prior time -- trades in which actual positions were taken by both sides to the transaction.

The fluidity of the definitions ascribed to the term "accommodation trade" over the years, as described in Point II(A) supra, patently suggests that the term is unduly vague. The fact that the Senate Committee considering the 1974 enactment of the Act recoiled from attempting a definition of the term strongly suggests that it is a meaningless term

The "void-for-vagueness" doctrine applies to any government agency attempt to prescribe or proscribe individual conduct. See, e.g., Ashton v. Kentucky, 384 U.S. 195, 200 (1966). ("Vague laws in any area suffer a constitutional infirmity.") See also Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Baggett v. Bullitt, 377 U.S. 360 (1964); Flipside, Hoffman Estates, Inc. v. Village of Hoffman Estates, 639 F.2d 373 (7th Cir. 1981); Paccar, Inc. v. Nat'l Highway Traffic Safety Administration, 573 F.2d 632 (9th Cir.), cert. denied, 439 U.S. 862 (1978); Boutilier v. Immigration & Naturalization Serv., 363 F.2d 488 (2d Cir. 1966), aff'd, 387 U.S. 118 (1967).

Under the void-for-vagueness rule, vague or fluid terms, such as "accommodation trade", may not be used to identify the act which is prohibited. Grayned v. City of Rockford, 408 U.S. 104 (1972); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961); United States v. La Mantia, [1977-80 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,667 (N.D. Ill. 1978).

In Grayned, supra, the Supreme Court definitively stated the policy considerations supporting the due process prohibition against vague regulatory statutes as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic

> policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." [Footnotes omitted.] 408 U.S. at 108-109.

Earlier, in language particularly appropriate to the present case, the Supreme Court struck down a constitutionally vague statute stating the reasoning governing the present appeal, "'Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula.'" Cramp, supra, 368 U.S. at 287, quoting from United States v. Cardiff, 344 U.S. 174, 176 (1952).

Here, it is the fluid and expanding meaning which the CFTC attempts to ascribe to the term "accommodation trade" which offends against the constitutional principles as much as the fact that the term is almost impossible of definition.

Indeed, "fictitious sale", a companion in §4c(a) to "accommodation trade", was held constitutionally vague by the court in La Mantia, supra, because, like the term "accommodation trade" as applied by the CFTC in the present case, it was not defined in the Act, there was no judicial construction of the term, the term did not appear in treatises on commodities and the definition sought by the government was not supported by the legislative history of the Act.

Nowhere in the present record has the CFTC purported to substantiate its application of the term "accommodation trade" to the subject transaction; and nowhere in the prior history of the Act or its predecessor statutes does there appear any indication that the subject transaction was intended to be proscribed by the Act's prohibition of "accommodation trades".

If, as the CFTC apparently asserts, the term "accommodation trade" has no fixed meaning but may be defined and redefined to supply authority for sanctions whenever the CFTC feels impeded by the limitations of its proper statutory mandate, then the term is clearly too vague to give reasonable prior notice of the conduct sought to be prohibited.

Thus, whether on the ground that the application advanced by the CFTC in the present case exceeds the scope of all prior authoritative definitions of the term, or on the alternative ground that the various definitions applied to the term establish its fluidity and imprecision, the imposition of severe sanctions against Mr. Sundheimer upon the basis of his participation in an act characterized as "tantamount to" an "accommodation trade" violates his constitutional right to due process.

IV

THE CFTC WRONGFULLY DENIED MR. SUNDHEIMER A MEANINGFUL HEARING ON MITIGATION AND REHABILITATION

Section 8a of the Act empowers the CFTC to revoke the registration of a floor broker "after opportunity for hearing" upon a finding of unfitness by reason of conviction of a felony. Substantial CFTC authority establishes that the prescribed hearing must relate to the question of mitigation and rehabilitation. 40 F.R. 28126 (1975); In re Rafferty CFTC Docket No. 79-15 (1981) (Addendum at 6); In re La Mantia, 2 Comm. Fut. L. Rep. (CCH) ¶21,048 (1980); Lambert Joseph Hagan, [1975-1977 Transfer Binder] Comm. Fut. L. Rep (CCH) ¶20,171 (1976); Eugene E. Shaefer, Jr., [1975-1977 Transfer Binder] Comm. Fut. L. Rep.

(CCH) ¶20,191 (1976); Division of Enforcement v. Rodin, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,114 (1976).

By imposing the Seven Year Rule, without any prior notice to Mr. Sundheimer and by requiring proof of rehabilitation beyond "any doubt", not "reasonable doubt", the CFTC deprived the three day hearing on rehabilitation and mitigation of any meaning and turned it into a sham and mockery and denied Mr. Sundheimer the notice to which he was entitled. (See Point I(A), supra.)

The record is substantial in support of mitigation. The federal prosecutor stated that Mr. Sundheimer was "not intimately involved in the operation of the scheme on a day-to-day basis." (JA.89) He did not initiate the subject transaction, was never involved in it, was not a member of the unregulated market where it occurred; he merely acquiesced and, not being an owner of Pressner, he did not benefit. His reputation then and thereafter was of competence and the highest integrity.

The evidence of his rehabilitation was also substantial. He spent substantial time cooperating before charges were pending or imminent (JA.227-8, 230-1, 233), pleaded guilty, won the support of the prosecutors, and won the support of the prosecuting agency for which he performed his community service. He paid fines and accepted suspensions from commodities exchanges. Except during periods of suspension, he continued as a trader and broker with no hint of wrongdoing. He retained the respect of friends and business acquaintances. The CFTC, with full knowledge of the facts, renewed his registration annually through 1981.

One of the prosecutors, two of his supervisors at the prosecuting agency where he performed his community service, three close personal friends and ten prominent members of the commodity futures industry testified on Mr. Sundheimer's behalf in support of mitigation and rehabilitation. In particular, the testimony of the industry leaders was compelling.

Five, Rubin, Corby, Geraghty, Landry and Sanborn, were associated persons (the commodity industry's equivalent of customers' representatives) of substantial rank who were in need of the services of a floor broker who would efficiently and honestly execute their customer's orders. Mr. Sanborn, an E.F. Hutton vice-president (JA.321), described Mr. Sundheimer as

> "[o]ne of the more professional floor brokers * * * I would refer a good percentage of my business to him because of that reason * * * he is very honest, someone that I would trust * * * that I would put my faith in * * * one of the most competent * * * very highly regarded * * *." (JA.323).

Mr. Landry, a Dean Witter Reynolds vice-president (JA.403), testified of Mr. Sundheimer

> "that it would be very detrimental to our [Commodity Guided Account] program if we were not allowed to use him in the future [JA.405] * * * my ability to perform for my clients * * * is measured by my ability to choose the right broker * * * Steve has done an absolutely outstanding job * * *," (JA.409)

and that he would "absolutely not" use a broker he felt was dishonest. (JA.409).

Mr. Geraghty, a metal trader at Dean Witter Reynolds (JA.298), testified of Mr. Sundheimer that Mr. Geraghty's substantial European clients "prefer to use him [Mr. Sundheimer]"

(JA.302) and

> "I've always found him to be honest * * * I wouldn't give the brokerage to anyone that I thought might step ahead of me in a trade or do anything that would affect my customers, or else I wouldn't have the customers." (JA.302)

Mr. Corby, a Merrill Lynch Pierce Fenner & Smith vice-president (JA.190), testified of Mr. Sundheimer

> "the executions that I got for [from] him were fair and good for my customers * * * his reputation as a floor broker is good * * * his honesty and integrity are fine * * *." (JA.194)

Mr. Rubin, a Thompson & McKinnon vice-president (JA.177), testified that his company used Mr. Sundheimer because

> "the execution service that they gave on the exchange was excellent (JA.181) * * * I've never known him to do anything in terms of executing an order that was dishonest, and that he did not every [sic] try and execute an order to the best of his possible ability." (JA.182)

Two substantial customers, Mierfeld and Albertson, who used Mr. Sundheimer's services directly for their own accounts and therefore had a substantial interest in the integrity of the commodities market, testified in support of Mr. Sundheimer. Mr. Mierfeld, vice-president of Ray E. Friedman & Co., one of the largest firms in the industry (JA.281-2), testified that although he is licensed to trade on the floor of exchanges

> "I like to leave that to people who are experts at it as is Mr. Sundheimer" (JA.284),

and that Mr. Sundheimer had a "very good reputation" for honesty and integrity (JA.284).

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Mr. Albertson testified that he is a Florida processor of citrus products (JA.385) and that he employs Mr. Sundheimer's services as a broker because

> "I consider him able, knowledgeable, and very efficient in terms of his ability to execute in the ring (JA.389) * * * it very often involves discretion and judgment * * * I probably had the most successful experience, in terms of the service that I've obtained from any floor broker, in the relationship I have with Steve," (JA.390).

and that Mr. Sundheimer's honesty and integrity is "one of the highest magnitude in all of our dealings." (JA.390).

Three executive members of commodities futures exchanges, Stern, Herman and Mintz, testified on behalf of Mr. Sundheimer. Mr. Mintz, the Chairman of the Board of the Commodity Exchange, Inc. (JA.509), testified that he is a member of the New York Mercantile Exchange and has had business dealings with Mr. Sundheimer on that exchange (JA.509). He testified of Mr. Sundheimer

> "I've been satisfied greatly with the executions, the honesty of the executions, and the service * * * he's perfectly open, honest, and a very fine member of the Exchange." (JA.510)

Indeed Mr. Mintz testified of Mr. Sundheimer

> "I would recommend him for membership in Comex [Commodity Exchange, Inc.] * * * I would sponsor him, even though I'm Chairman of the Board." (JA.511)

Mr. Stern, a member of the Board of Governors of the New York Mercantile Exchange for 27 years and its Chairman Emeritus (JA.210), testified that he had appointed Mr.

Sundheimer to that exchange's Clearinghouse Committee and

> "he conducted himself with great distinction. His decisions, his recommendations were always in the public interest and for the good and general welfare of the Exchange." (JA.211)

He testified that he has placed orders with Mr. Sundheimer (JA.216-7) and that

> "his reputation [for honesty and integrity] is impeccable * * * incidentally, he happens to be a very capable broker as well (JA.213) * * * he's a credit to the commodity futures industry and to those people that he deals with." (JA.218)

Mr. Herman, a commodity trader and floor broker, who was a member of several commodities futures exchange boards and committees (JA.266-7), testified that he had done business with Mr. Sundheimer for many years. He testified that

> "[h]e has a very fine reputation as a floor broker, as an honest, competent broker * * * he's an extremely honest, reliable, competent broker and a good human being * * * many times * * * the major commission houses, when they had a difficult order to execute, direct it specifically for Mr. Sundheimer to handle * * * this is quite an accolade to have your colleagues entrust you with their personal business." (JA.269-270)

Under these circumstances, it was improper for the CFTC, without notice, to adopt the Seven Year Rule without stating any rational basis for it, and therefore deprive Mr. Sundheimer of the meaningful hearing to which due process entitled him. FCC v. National Citizens Comm'n for Broadcasting, 436 U.S. 775 (1978); Goldberg v. Kelly, 397 U.S. 254 (1970); Armstrong v. Manzo, 380 U.S. 545 (1965); Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1979), as amended (1979); Florida v.

Mathews, 526 F.2d 319, 324 (5th Cir. 1976); Ashland Oil & Refining Co. v. FPC, 421 F.2d 17, 23 (6th Cir. 1970). Here, there is no rational basis for adopting and applying a rule that, as a matter of law, a person may not be rehabilitated seven years after aiding another's tax fraud by acquiescence. On that theory, we would never dare release a felon from supervision in less than seven years.

In Goldberg and Armstrong, supra, the Supreme Court held that the hearing required of an agency must be a "meaningful" one, 397 U.S. at 267; 380 U.S. at 552.

In National Citizens, supra, the Supreme Court held that any agency's rules may be invalidated by a reviewing court

> "if they are not rational and based on consideration of the relevent factors." 436 U.S. at 803.

In Local 777, supra, the court was confronted with a fact pattern where the NLRB, as has the CFTC here, had made substantially inconsistent decisions about the distinction between employment and independent contracting. The court held that an agency must conform to its own precedents or explain its departure, citing International Union v. NLRB, 459 F.2d 1329 (D.C Cir. 1972), and stated the rule governing the present proceeding as follows:

> "Although an agency may change its policy as it determines is in the public interest, [citation omitted] when, as here, it announces no principled reason for such a reversal, its action is arbitrary and the courts should be quick to so declare." 603 F.2d at 882.

There is no rational basis for the CFTC's harsh conclusion that an individual may not be rehabilitated in seven years. The CFTC did not even attempt to state a rational basis and, in view of other CFTC rulings, it cannot. In Rafferty, supra, the respondent had pleaded guilty in September, 1977 to two felony counts of conspiracy to commit securities and mail fraud and filing false income tax returns. He was found to be rehabilitated by decision dated July 15, 1981, despite his psychiatrist's testimony that

> "I don't think anybody can certify anybody's behavior that they're not going to do anything."

In In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980), the CFTC's decision tacitly held that Mr. Nordlicht, who actually negotiated the wrongful transaction which is the subject of this proceeding, while Sundheimer merely acquiesced, would be deemed rehabilitated by February of 1982. Accordingly, the CFTC's action was arbitrary and Sundheimer's registration as a floor broker should also be restored.

V

THE CFTC WAS ARBITRARY AND CAPRICIOUS IN THE MANNER IN WHICH IT IMPOSED SANCTIONS

The permanent revocation of Mr. Sundheimer's broker registration and the $100,000 penalty are the maximum permitted by the Act. The two-year prohibition of trading is substantial.

The CFTC's imposition of sanctions is subject to court review. APA, 5 U.S.C.A. §§551, 702, 704; Arthur Lipper Corp. v. SEC, 547 F.2d 171, 183-84 (2d Cir. 1976), cert. denied, 434 U.S.

1009 (1978); Beck v. SEC, 430 F.2d 673 (6th Cir. 1970).

The sanctions imposed by the CFTC constitute a gross abuse of discretion because they were applied discriminatorily, Sartain v. SEC, 601 F.2d 1366 (9th Cir. 1979); see also Hiller v. SEC, 429 F.2d 856 (2d Cir. 1970), and because they do not bear a reasonable relation to the conduct which evoked the sanctions, Kent v. Hardin, 425 F.2d 1346 (5th Cir. 1970), or the goals the Act was designed to accomplish, Barnum v. National Transportation Safety Bd., 595 F.2d 869, 872 (D.C. Cir. 1979).

Moreover, the CFTC has not adequately stated its grounds for imposing its most severe sanctions.

A. The Sanctions Were Discriminatorily Imposed upon Mr. Sundheimer.

The sanctions imposed upon Mr. Sundheimer are substantially greater than those imposed upon Mr. Nordlicht*, even though Mr. Nordlicht was the active participant in the offense on behalf of Pressner and Mr. Sundheimer was not directly involved, see In re Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (1980); and despite Judge Broderick's conclusion that Mr. Nordlicht deserved twice the penalty imposed on Mr. Sundheimer. See Arthur Lipper, supra, 547 F.2d at 184, in which one important factor considered by this Court in its determination to reduce the penalties imposed by the SEC was "the tremendous disparity between the sanctions invoked against petitioner and that imposed on the two other brokers whose violations were perhaps more clear."

Curiously, although the determination of liability in

* The prohibition is greater by a magnitude of eight.

Nordlicht, supra, precisely parallels the initial determination of liability in the present case, the further proceedings as to mitigation and rehabilitation of which Mr. Sundheimer availed himself resulted in a far more severe penalty despite the CFTC's conclusion that certain of the violations attributed to Mr. Sundheimer by the ALJ were not sustainable. It is not proper to subject Mr. Sundheimer to punishment greater than that imposed upon Mr. Nordlicht "in retaliation for a petitioner's assertion of his federal rights." Sartain, supra, 601 F.2d at 1375.

Indeed, despite the longstanding principle that the sanctions imposed under the Act against different violators for similar violations should be reasonably uniform [see, e.g., In re Romoff, 31 Agric. Dec. 158, 177 (1972)], the penalty to which the CFTC has subjected Mr. Sundheimer appears draconian in comparison to the sanctions heretofore imposed for purported transgressions of similar nature. Contrast, e.g., the 15 day suspension of registration imposed upon respondents Lamborn and Blankenship for virtually identical conduct in In re Richardson Securities, Inc., ("Richardson I"), [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,842 (1979); the 15 day suspension of registration and $5,000 fine imposed on respondent Levine for virtually identical conduct (see Richardson, supra, ¶20,842 at pp. 23,458-459) in In re Richardson Securities, Inc. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,810 (1979), and the $100,000 fine and holding "in abeyance" of all other sanctions imposed upon respondent Siegel Trading Co., Inc. for prearranged tax straddles, bukeeting and wash sales, in In re Siegel Trading Co., Inc., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,452 (1977

B. The Sanctions Do Not Bear a Reasonable Relation to the Purposes of the Act.

The primary purpose of the Act is the protection of the price discovery mechanism. Act, §3 [7 U.S.C.A. §5]. Accordingly, market manipulation is considered to be the most serious violation of the Act. Hugh P. King, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,211 at p. 21,153 (1976).* Mr. Sundheimer, however, was not found to have engaged in market manipulation, nor to have participated in activities operating as a fraud on any cusotmer or market participant. Contrast the 18 month suspension imposed for extensive unauthorized trading in a customer's account in In re Haltmier, [1975-1977 Transfer Binder] Comm Fut. L. Rep. (CCH) ¶20,160 (1976). See, also, In re Clancy, 2 Comm. Fut. L. Rep. (CCH) ¶21,126 (1980). Clearly, the imposition in the present case of the most severe sanctions for an offense which the CFTC could not find to be clearly proscribed by the Act does not further the goals of the Act. See, also, Richardson I and Siegel Trading, supra, in which the extended discussions by the ALJ's belie the CFTC's characterization of the tax straddle transactions at issue as among the most serious violations of the Act.

* The King case provides further illustration of the gross disparities in sanctions meted out by the CFTC. There, in a decision apparently intended to convey the CFTC's deep concern over charges of market manipulation, the Commission nevertheless settled the charges against the respondent upon his acceptance of a 45 day trading and registration suspension, together with a cease and desist order. The facile explanation (i.e., administrative convenience) for this extremely lenient treatment of a person charged with "unlawful activities of the most serious type proscribed by the act," id., merely underscores the fact that the CFTC exercises its drastic powers in a most arbitrary and capricious fashion, subject to favoritism, bias, and whim. See, also, In re Hunt, [1977-1980 Transfer Binder] Comm Fut. L. Rep (CCH) ¶20,805 (1979); In re Carr, [1977-1980 Transfer Binder] Comm Fut L Rep. (CCH) ¶20,454 (1977).

Moreover, the decision to impose lesser sanctions on Mr. Nordlicht is authority that lesser sanctions are required to achieve the goals of the Act.

C. The CTFC Sanctions Are Not Supported by Adequate Findings.

The CFTC failed to disclose any grounds for its imposition of harsh sanctions upon Mr. Sundheimer. A federal agency, however, must clearly disclose the grounds of its decision as to sanctions. Appalachian Power Co. v. EPA, 545 F.2d 1351, 1356 (4th Cir. 1976); Steadman v. SEC, 603 F.2d 1126, 1139-40 (5th Cir. 1979), aff'd, ___ U.S. ___, 67 L.Ed.2d 69 (1981); see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

In Steadman, supra, the court remanded the case to the SEC for further consideration of the sanctions imposed holding as follows:

> "Where, as here, the most potent weapon in the Commission's 'arsenal of flexible enforcement powers,' Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195, 96 S.Ct. 1375, 1382, 47 L.Ed.2d 668 (1976), is used, the Commission has an obligation to explain why a less drastic remedy would not suffice." 603 F.2d at 1139.

Indeed, in affirming Haltmier, supra, this court similarly admonished the CFTC itself, as follows:

> "Nevertheless, though we uphold the full sanction in this case, we remind the Commission that the Act does not compel it to impose across-the-board suspensions automatically whenever any violation is shown, and that it has, and should exercise, discretion in the individual case to determine how much of the full statutory remedy it should invoke. The agency's discretion as to the length of a suspension, extends also to the type and extent of the suspension, as well as to its choice

among the various remedies the statute authorizes. See, generally, Amalgamated Local Union 355 v. N.L.R.B., 481 F.2d 996, 1006-1009 (2d Cir. 1973). It would be well if the Commission revealed in its opinions that it had exercised the discretion it possesses." Haltmier v. CFTC, 554 F.2d 556, 564 (2d Cir. 1977).

Here, ignoring this court's warning, the CFTC again refused to explain how it reached the conclusion that Mr. Sundheimer's passive acquiescence "constitutes a serious violation" under the Act (JA.17) or was "nearly egregious as * * * the gravest offense under the Act" (JA.20-21).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Order should be vacated to the extent it imposes §4c(a) Sanctions. The vacation may be without or with remand since certain grounds for review, lack of evidence of a violation, the CFTC's exceeding of its authority, the vagueness of the statutory provision and laches in giving notice of the charge, indicate that remand is inappropriate. The Order should be vacated and remanded for further hearings to the extent it revokes Mr. Sundheimer's floor broker registration.

Respectfully submitted,

BURNS & FOX
Attorneys for Petitioner
360 Lexington Avenue
New York, New York 10017
(212) 687-6290

IV. SUNDHEIMER'S GUILTY PLEA AND HIS PLEA STATEMENT PRECLUDE HIM FROM DENYING THAT HE VIOLATED THE ACT.

"The effect of a plea of guilty that meets constitutional standards is determinative: 'it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.'" United States ex rel. Rosa v. Follette, 395 F.2d 721, 724 (2d Cir. 1968) (citations omitted). There is no contention that Sundheimer's guilty plea is defective. It is, therefore, determinative of the charges in the information.

It is not disputed that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U.S. 558, 568-569 (1951) (citation omitted). Where, however, there is a guilty plea, the truth of the averments in the information is admitted, United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). And, furthermore, "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the Northern District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Holloway, J., concurring in the result) (citation omitted).

25/ (Footnote continued)

> feiting, gambling, or similar crimes; or (4) involves the violation of section 1341, 1342, 1343 of Title 18, United States Code. . . ."

40 Fed. Reg. 28125-28126 (June 30, 1975) (emphasis added). Compare, Local 777 v. National Labor Relations Board, 603 F.2d 862, 871-872 (D.C. Cir. 1979).

The Commission concluded that Sundheimer was estopped to deny, as set forth in the information

> "'creating predetermined losses . . . for the fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following fiscal years.'"

(JA. 14-15; emphasis added by the Commission). As the Commission noted, "creation" of gains in the following years necessarily includes trading after October 31, 1975. (JA. 15). Accordingly, Sundheimer's guilty plea established that the prearranged trading authorized by him was engaged in after April 21, 1975, the date on which the Act became applicable to certain previously unregulated commodities, including crude oil. See supra p. 12; see also JA. 15.

Nevertheless, Sundheimer urges at length (S. Br. 14-19), that his plea is ambiguous as to any particular act charged in the information. In doing so, however, Sundheimer ignores both the text of the criminal information (JA. 65-66) and the plain meaning of his own statements on pleading guilty.

The information charges "[f]rom in and around September, 1974 until on or about July 19, 1976," Sundheimer aided preparation and presentation of false tax returns and "fixed, rigged and fraudulently prearranged trades" of crude oil contracts in furtherance of the tax offense. (JA. 65). Read as a whole, the information plainly charges prearranged trading from September 1974 to July 19, 1976. Moreover, the information's allegations of prearranged futures trading are an integral part of the tax offense charged. The prearranged trading is the method by which Sundheimer aided the filing of false tax returns (see JA. 65-66; see also JA. 15).

This relationship was acknowledged by Sundheimer in his plea statement. When asked by the District Court "just what it is you did," Sundheimer responded that he consented to his company's participation in prearranged trading "that would ultimately enable an oil company to obtain tax benefits . . . ." (JA. 77).

Further, in response to the District Court's question whether Sundheimer's consent in 1974 extended to transactions to enable the oil company to take tax losses for a second year, fiscal 1975, Sundheimer responded: "I think that it was implicit in the initial understanding. There was no additional consent required." (JA. 77). And as discussed above, the guilty plea itself conclusively establishes that the consent went well beyond October 1975.

V. SUNDHEIMER'S ACTIVITY CONSTITUTES ONE OF THE MOST SERIOUS VIOLATIONS OF THE ACT.

A. The Illegal Accommodation Trades.

On pleading guilty, Sundheimer described Pressner's role in the oil company's tax trading scheme as follows (JA. 77, emphasis added):

> "Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.
>
> I gave my consent to that arrangement and I was present when it was made."

As the Commission's opinion makes clear this tax scheme in the crude oil market was effected by means of illegal, accommodation trading (JA. 16, n.9):

> "[The prearranged trading authorized by Sundheimer furnished] the oil company with a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk, and to that extent, they were tantamount to 'accommodation trades' . . . prohibited by Section 4c(a)(A) of the Act."

The Commission concluded that Sundheimer participated "in a scheme involving the prearrangement of commodity futures transactions . . . and that this constituted a violation of Section 4c(a)(A) of the Act" (JA. 15-16).

All forms of prearranged trading schemes are recognized as an evil under the Act. In 1948, the Commission's predecessor agency explained that Section 4c(a) does

> "not stop at the prohibition of 'wash sales.' It also prohibits any transaction that is of the character of a wash sale [emphasis in original], is commonly understood to the trade as a wash sale, or is a fictitious sale. The language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading [emphasis added] on the basis of supply and demand factors and trading opinion of these factors."

In re Jean Goldwurm, 7 Agric. Dec. 265, 275-276 (1948). Similarly, Rule 1.38, 17 C.F.R. 1.38 has long prohibited most prearrangement of trades:

> "(a) Competitive execution required. . . . All purchases and sales of any commodity for future delivery on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place

provided by the contract market, during the regular hours prescribed by the contract market for trading in such commodity. . . ." 26/

B. The Prohibition Against Accommodation Trades Is Constitutional.

While the term accommodation trade is not defined in the Act, the Supreme Court has noted that

> "[t]here are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest."

United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, 413 U.S. 548, 578-579 (1973), quoted in Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973). See also Precious Metals Associates Inc. v. Commodity Futures Trading Commission, 620 F.2d 900, 907 (1st Cir. 1980).

Sundheimer, however, contends that this statutory prohibition is unconstitutionally vague (S. Br. 33-36). While "a statute attacked as vague must initially be examined 'on its face', . . . it does not follow that a readily discernible dividing line can always be drawn, with statutes falling neatly into one of the two categories of 'valid' or 'invalid' solely on the basis of such an examination." United States v. National Dairy Products Corp., 372 U.S. 29, 32 (1963). In fact, "[t]he strong presumptive validity that attaches to an Act of Congress has led [the Supreme] Court to hold many times that statutes are not automatically invalidated as vague simply because

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26/ Accordingly, Mr. Sundheimer's assertion that (S. Br. 7, n.2), "pre-arrangement is not a per se evil in the case of auction markets," is not accurate. He erroneously relies for his authority on the practice in the securities markets.

difficulty is found in determining whether certain marginal offenses fall within their language." Id. (citations omitted).[27/]

In the area of securities law, the Supreme Court has rejected a literal approach to the definition of the term "security", holding rather that

> "Because securities transactions are economic in character Congress intended the application of these statutes to turn on the economic realities underlying a transaction, and not on the name appended thereto."

United Housing Foundation, Inc. v. Forman, 421 U.S. 837, 849 (1975).[28/]

Several sources of definition are commonly used to determine the meaning of a statutory term. Thus, if the term is one of common understanding, those charged with its violation are held to that comprehension. United States v. Harriss, 347 U.S. 612, 617 (1954); Coplin v. United States, 88 F.2d 652, 657 (9th Cir.), cert. denied 301 U.S. 703 (1937). The second source of definition is prior judicial construction. Wainwright v. Stone, 414 U.S. 21, 22-23 (1973). A third source of definition is the trade usage or professional context to which the statute applies. Hygrade Provision Co. v. Sherman, 266 U.S. 497, 502 (1925). As set forth below, prior administrative application of the term is consistent with its everyday meaning, that is, to assist another.

27/ The Supreme Court went on to say:

> "Indeed, we have consistently sought an interpretation which supports the constitionality of legislation,"

413 U.S. at 32 (citations omitted).

28/ Analogously, Section 4c(a) of the Act does not define "accommodation trades." Rather, it prohibits any transaction which "is, is of the character of, or is commonly known to the trade as . . . [an] 'accommodation trade'." The Act takes a similar approach concerning transactions which are "of the character of" options. See Section 2(a)(1) of the Act; British American Commodity Options Corp. v. Bagley, 552 F.2d 482, 486 (2d Cir.), cert. denied 434 U.S. 938 (1977).

In In re Julian M. Marks, et al., 20 Agric. Dec. 457, 458, 459 (1961), Stuart A. Newman, one of five respondents, was charged with, inter alia, "entering into accommodation trades [and] executing transactions noncompetitively. . . ." "[A]s a result of direct and noncompetitive negotiations with . . . Mr. Marks," Mr. Newman purchased wheat futures for his own account from Mr. Marks, and simultaneously sold the same amount of wheat futures to Mr. Marks for a different total price.

> "In each of these transactions, Newman was 'accommodating' Marks, that is helping Marks to execute his orders."

Id. at 460 (emphasis supplied). 29/

In a related case involving another of the five respondents, In re Julian M. Marks, et al., 22 Agric. Dec. 761 (1963), Irwin M. Eisen was charged with "making noncompetitive trades in wheat for future delivery. . . ." Mr. Marks sold May wheat to Eisen for a customer and bought May wheat from Eisen for his own account, "thus putting Marks on the other side of his customer's order by an accommodation trade by Eisen." Id. at 766.

> "This was an accommodation trade by Eisen and Marks, and a cross trade by Marks, in violation of section 4c(a) of the act, and a noncompetitive trade by both respondents, in violation of section 1.38 of the regulations. Eisen must have known that this would enable Marks either to take the other side of a customer's trade or to cross customers' trades, either of which would be a violation by Marks, in which he was assisted by Eisen." Id. at 772. 30/

29/ Some of Newman's accommodations were gratis, while he was compensated for others. "This in no wise affects the character of the transaction." Id. at 460.

30/ See also Id. at pp. 766, 773 concerning an accommodation trade between respondents Eisen and Smith; and Id. at pp. 768, 776 concerning accommodation trades between respondent Marks and Newman.

In a third case In re Irwin M. Eisen, 22 Agric. Dec. 758, 759 (1963), Mr. Eisen was charged with "entering into a transaction which is, or is of a character of, a 'wash sale' and an 'accommodation trade,' . . . ." Since the 'wash sale' entered into "had the effect of enabling the opposite broker's buying customer to buy from his selling customer, it is of the character of an accommodation trade . . . ." Id. at 760.[31/]

In light of the history of agency explication, which is consistent with the common usage of the term, it cannot be said that the statutory term is vague. Particularly as applied to market professionals, this statutory prohibition gives more than adequate warning. See Precious Metals Associates, Inc. v. Commodity Futures Trading Commission, supra, 620 F.2d at 907-908.

Much like the test for manipulation, the test of prohibited transactions, and in this case "accommodation trades", "must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished." See Cargill, Inc. v. Hardin, supra, 452 F.2d at 1163. The methods and techniques of prearranged trading like those for manipulation are "limited only by the ingenuity of man." Id. The issue is whether conduct has been intentionally engaged in that has resulted in trades being accomplished outside the competitive scheme of the commodity futures market for the purpose of enabling or assisting

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31/ For another example of prohibited accommodation trades see In re Laiken, 23 Agric. Dec. 1193 (1964), affirmed, Laiken v. Department of Agriculture, 345 F.2d 784 (2d Cir. 1965).

another in an illegal trade. See Commodity Futures Trading Commission v. Savage, 611 F.2d 270, 283-284 (9th Cir. 1979).[32/]

VI. THE COMMISSION PROPERLY EXERCISED ITS STATUTORY DISCRETION IN IMPOSING SANCTIONS AGAINST SUNDHEIMER FOR VIOLATION OF THE ACT.

"It is a fundamental principle . . . that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" American Power & Light Co. v. Security and Exchange Commission, 329 U.S. 90, 112 (1946), quoting Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194 (1941). Accord Gilligan, Will & Co. v. Securities and Exchange Commission, 267 F.2d 461, 468 (2d Cir.), cert. denied, 361 U.S. 896 (1959). Thus, the Commission's choice of sanction should not be overturned unless the Court of Appeals finds it "unwarranted in law or . . . without justification in fact . . . ." American Power & Light Co. supra, 329 U.S. at 112-113; Butz v. Glover Livestock Commission Co., Inc., 411 U.S. 182, 185-186 (1973); see also Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 563.

If, upon evidence received, the Commission finds any person violating or having violated the Act, Section 6(b) of the Act, 7 U.S.C. §9, provides that the Commission

> "may prohibit such person from trading on or subject to the rules of any contract market and require all contract markets to refuse such person all trading

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32/ Sundheimer challenges the Commission's phrasing (JA. 16) of its statement that the trades authorized by Sundheimer were "tantamount to" accommodation trades. (S. Br. 25-26). The statute, however, prohibits transactions "of the character of" accommodation trades. The Commission's obvious semantic variation on the statutory phrase can hardly be said to be an attempt, as urged by Sundheimer, to expand the statute.

privileges thereon for such period as may be specified in the order, . . .

"and may assess such person a civil penalty of not more than $100,000 for each such violation."

Section 6(c) authorizes issuance of cease and desist orders. Here, the Commission required Sundheimer to cease and desist the violative activity found, suspended his trading privileges for two years and assessed a $100,000 money penalty for the violations.

Accordingly, the sanctions imposed for the unlawful prearranged trading are not "unwarranted in law," American Power & Light, supra, 329 U.S. at 112. Nor are the sanctions unwarranted in fact, id.

The two-year trading suspension was imposed on Sundheimer to protect the markets and as an exemplary penalty, supra, p. 10. The maximum $100,000 penalty was premised on the Commission's view that Sundheimer's conduct was particularly egregious in that the unlawful trading was deliberately entered into, on the gravity of the violations, on the fact that they continued for at least two years, and on the fact that they were entered into for financial gain, supra, p. 10. Similarly, the cease and desist order is plainly appropriate in this case. Cf. Butz v. Glover Livestock Commission, supra, 411 U.S. at 183, 187.

Sundheimer's assertion (S. Br. 47) that the Commission "failed to disclose any grounds for its imposition of harsh sanctions" is simply without merit. Indeed, the articulation by the Commission is fully consistent with this Court's suggestion in Haltmier v. Commodity Futures Trading Commission, supra, 554 F.2d at 564.

Sundheimer contends that the penalty here is invalid as being more severe than penalties imposed upon others (S. Br. 44-45). The Court of Appeals for the Seventh Circuit was unimpressed with such a "specious argument" in G.H. Miller & Co. v. United States, 260 F.2d 286, 296 (7th Cir. 1958), cert. denied, 359 U.S. 907 (1959). The Court of Appeals stated therein that (emphasis in original)

> "if the order of an administrative agency finding a violation of a statutory provision is valid and the penalty fixed for the violation is within the limits of the statute the agency has made an allowable judgment in its choice of remedy and ordinarily the Court of Appeals has no right to change the penalty. . . ."

The Supreme Court cited this holding with approval in Butz v. Glover Livestock Commission Co. Inc., 411 U.S. at 187, and went on to say:

> "The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

Id.[34/] See also, Hiller v. Securities and Exchange Commission, 429 F.2d 856, 858

34/ The cases cited by Sundheimer for this disparity (S. Br. 44-45) are in any event plainly distinguishable. Cf. Sartain v. Securities and Exchange Commission, 601 F.2d 1366, 1375 (9th Cir. 1979).

In re Romoff, 31 Agric. Dec. 158 (1972), involved failure to file reports, in violation of the Commodity Exchange Act, for which a cease and desist order was entered and Romoff was prohibited from trading on or subject to the rules of any contract market for a period of three years. This is a year longer than Sundheimer has been prohibited from trading for a far more egregrious violation of the Act. Furthermore, In the Matter of Richardson Securities, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,842 (June 15, 1979) and In the Matter of the Siegel Trading Company, Inc. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,452 (July 26, 1977) are initial decisions by Administrative Law Judges, not the Commission, and In the Matter of Richardson Securities, Inc., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,810 (April 16, 1979) is an acceptance of a settlement offer.

(2d Cir. 1970) in which this Court reiterated its decision in Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 110 (2d Cir.1967), stating that

> "even if the penalties were disproportionate, 'it is irrelevant because the sanctions imposed upon the petitioners were well within the Commission's discretion.' A fortiori, we cannot disturb the sanctions ordered in one case because they were different from those imposed in an entirely different proceeding."35/

35/ Sundheimer places special emphasis on the relatively slight sanctions imposed pursuant to settlement of allegations of market manipulation In the Matter of Hugh P. King, [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,211 (CFTC 1976). (S. Br. 46 n.1). In its Opinion and Order accepting King's offer of settlement, the Commission acknowledged that "due to factors particularly unique to [that] case" it had decided to accept the offer imposing sanctions "which it considers to be less severe than ordinarily would be applied" in a contested manipulation case. Id. at p. 21,153. The Commission cautioned, however,

> "In this regard, the Commission wishes to emphasize that the settlement herein shall have no precedential effect whatever either from the standpoint of sanctions imposed or in settlement of pending cases. The staff is, accordingly directed to disregard this less strigent sanction in its analysis of what is an appropriate remedy in any cases before it or in its determination of what would be an acceptable settlement of a pending case. Persons having pending matters before the Commission are therefore advised that in the future the Commission will only impose substantially increased sanctions in cases of this type.

Id. at p. 21,154 (emphasis added).

Finally, nothing is present similar to the "special circumstances" cited by this Court in limiting an administrative sanction of the Securities and Exchange Commission. Arthur Lipper Corp. v. Securities and Exchange Commission, 547 F.2d 171,184-185 (2d Cir. 1977), cert. denied, 434 U.S. 1009 (1978).

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> "In this regard, the Commission wishes to emphasize that the settlement herein shall have no precedential effect whatever either from the standpoint of sanctions imposed or in settlement of pending cases. The staff is, accordingly directed to disregard this less strigent sanction in its analysis of what is an appropriate remedy in any cases before it or in its determination of what would be an acceptable settlement of a pending case. Persons having pending matters before the Commission are therefore advised that in the future the Commission will only impose substantially increased sanctions in cases of this type.

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CONCLUSION

For all the foregoing reasons, this Court should affirm the Commission's Opinion and Order in all respects.

Respectfully submitted,

DENNIS A. DUTTERER
General Counsel

PAT G. NICOLETTE
Deputy General Counsel

GREGORY C. GLYNN
Associate General Counsel

GLYNN L. MAYS */
Assistant General Counsel

Commodity Futures Trading
Commission
2033 K Street, N.W.
Washington, D. C. 20581

Dated: December 1, 1981

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*/ Vivian C. Kresslein, a law clerk in the Office of the General Counsel, assisted in the preparation of this brief.

81-4186

To be argued by
JOHN M. BURNS, III

United States Court of Appeals

FOR THE SECOND CIRCUIT

STEPHEN M. SUNDHEIMER,
Petitioner,

—against—

COMMODITY FUTURES TRADING COMMISSION,
Respondent.

ON PETITION FOR REVIEW FROM THE
COMMODITY FUTURES TRADING COMMISSION

REPLY MEMORANDUM ON BEHALF OF PETITIONER

BURNS & FOX
Attorneys for Petitioner
360 Lexington Avenue
New York, New York 10017
(212) 687-6290

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B. In respect of the revocation of the floor broker registration (the "Revocation"):

5. Whether the Seven Year Rule and the "any doubt" rule made a sham and mockery of the hearing on rehabilitation and mitigation?

6. Whether there was substantial evidence that Mr. Sundheimer "can [now] be trusted" (C.Br. p.18)?

C. In respect of both the Sanctions and the Revocation:

7. Whether the CFTC's conceded imposition of substantially harsher Sanctions and Revocation on Mr. Sundheimer than upon Pressner's more active participant, Mr. Nordlicht, who presented no evidence of mitigation and rehabilitation, establishes that the CFTC behaved arbitrarily and capriciously?

The C.Br. misstates and twists facts and relies upon these misstated and twisted facts to support otherwise unsupportable charges against Mr. Sundheimer (see infra, p.6). More significantly, however, the C.Br. deliberately courts confusion

(a) between the legal issues surrounding the Revocation and Sanctions; and

(b) between the sole violation of the Act claimed by the CFTC -- "tantamount to 'accommodation trades'" -- and other CFTC disclaimed wrongdoings -- prearranged trading and manipulation -- which the CFTC properly held were not chargeable against Mr. Sundheimer but which appear to be the major topic of the C.Br.

Petitioner submits that the CFTC's effort to confuse

REPLY MEMORANDUM ON BEHALF OF PETITIONER

THE ISSUES AS NOW FRAMED BY THE BRIEFS

Overt and discreet concessions of the CFTC* Brief (the "C.Br.") permit the refinement of certain issues on this review as follows:

A. In respect of the trading prohibition, fine and cease and desist order (the "Sanctions"):

1. Whether the CFTC's tacitly conceded denial of Mr. Sundheimer's constitutionally protected right of notice of the actual charges against him alone requires vacatur of the Order?

2. Whether the CFTC's overt concession (C.Br. p.17 n.23)** that the criminal pleading colloquy upon which it relies to support summary disposition was "only partial" as to the time of the transactions defeats the CFTC claim that it summarily established transactions occurring after crude oil futures became subject to regulation?

3. Whether the CFTC's resort to the Tantamount Holding is a wrongful and deliberate attempt to expand its jurisdiction beyond that authorized by the Act?

4. Whether the term "accommodation trade" has any meaning whatsoever and whether any acceptable meaning is applicable to the subject transactions?

---

* Terms defined in Mr. Sundheimer's Brief in Chief ("S.Br.") shall be used herein with the same meaning.

** The CFTC also tacitly concedes that words would have to be added to the colloquy for it to support summary disposition (C.Br. p.23, see infra, p.14).

merely dramatizes the weaknesses in the CFTC's position on this appeal. Accordingly, the petitioner requests that the Court on this review give particular attention to the significant statutory distinctions between the grounds for the Sanctions and the grounds for Revocation. A floor broker registration may be revoked upon the conviction of a felony, after a determination as to rehabilitation and mitigation. The felony conviction itself bears no relevance to the Sanctions. The Sanctions may be imposed only upon a showing of a violation of the Act, which showing, petitioner submits, was not made in the present proceeding.

Petitioner also requests that the Court on this review pay particular attention to the facts that

(a) prearranged trading per se is not a violation of the Act and, indeed, is specifically authorized under certain circumstances by Reg. 1.38 of CFTC's General Regulations,*

(b) the CFTC specifically and properly found that manipulation was not proved against Mr. Sundheimer (JA.12,16 and, in particular, n.10), and

(c) no charge of conspiracy was ever made against Mr. Sundheimer in the criminal or the CFTC proceeding.

Therefore, the extensive discussions of prearrangement, conspiracy and manipulation which permeate the entire C.Br. (C.Br. pp.6,7,8, 9,10,12,17,18,22,23,24,25,28,30) respond to sham issues and bear

* The only prohibition of any form of prearranged trading is contained in Reg. 1.38. Mr. Sundheimer was not charged with a violation of Reg. 1.38 (See complaint, JA.28).

no relevance whatsoever to the true issues respecting the Sanctions. The true issues are concerned only with the determination whether Mr. Sundheimer aided something "tantamount to" an accommodation trade.

AREAS OF AGREEMENT BETWEEN THE PARTIES

The C. and S. Briefs establish substantial areas of tacit agreement between the parties (either because the CFTC attempted no response to the S.Br. statement or because the CFTC response inadequately addresses the issue) as follows:

1. The criminal conviction itself relates only to the Revocation on the grounds of unfitness and in itself is not ground for the Sanctions (no CFTC response).

2. The Sanctions and the Revocation deprive Mr. Sundheimer of substantial constitutionally protected rights which may not be abridged without due process of law (no CFTC response).

3. Due process of law requires meaningful notice and a meaningful hearing (no CFTC response).

4. Meaningful notice of charges is an absolute right in an agency proceeding because a party is entitled to answer charges against him at every step of the proceeding. Mr. Sundheimer was not notified that summary disposition would be sought or sustained on the ground that he had aided an accommodation trade or its tantamount (no CFTC response).

5. A plea of guilty to a multi-element single count charging instrument does not establish by collateral estoppel any one of the multi-elements of the single count (inadequate CFTC

response, see p.15, infra).

6. The colloquy between Judge Broderick and Mr. Sundheimer upon which the CFTC relied to sustain summary disposition "is only partial as to the four, or more, year scope of the conspiracy ***" [emphasis added] (C.Br. p.17 n.23) and would have required the addition of the words "tax losses for a second year" (C.Br. p.23) to make the plea statement an unambiguous admission by Mr. Sundheimer of a violation of the Act.

7. Crude oil futures contracts did not become regulated or subject to CFTC jurisdiction until April 21, 1975 (specifically conceded, C.Br. p.7).

8. Prearrangement per se is not prohibited by the Act and is permitted under certain circumstances by the General Regulations of the CFTC. ("Similarly, Rule [Reg.] 1.38, 17 C.F.R. 1.38 has long prohibited most prearrangement * * *" [emphasis added] C.Br. p.24).

9. Summary disposition motions are analagous to summary judgment motions and should be denied under the same circumstances that a summary judgment motion should be denied (no CFTC response).

10. The Act does not prohibit acts "tantamount to" a prohibited act (inadequate CFTC response).

11. Substantial legislative history establishes the meaning of "accommodation trade" and requires the element of fictitiousness (no CFTC response). The same is true of the agency case law which has defined accommodation trades (inadequate CFTC response, see infra, p.19). The transactions involved in this

proceeding were not fictitious (no CFTC response).

12. The CFTC has no authority to impose sanctions except for an act prohibited by the Act (no CFTC response).

13. In imposing the Revocation, the CFTC relied on the "any doubt" standard and its rule, announced for the first time in the present proceeding, that seven years was too short a period to permit rehabilitation (conceded by CFTC, C.Br. pp.16,20).

14. Mr. Nordlicht was the prime actor on behalf of Pressner and even Pressner was merely an aider and abettor. Mr. Sundheimer's role was a passive one. Yet, the CFTC prohibited Mr. Sundheimer from trading for twenty-four months and prohibited Mr. Nordlicht for only three. Mr. Sundheimer was fined $100,000 and Mr. Nordlicht only $75,000. The Revocation is permanent; Mr. Nordlicht's floor broker registration revocation is for only two years (no CFTC response).

THE FACTS MISSTATED AND TWISTED IN THE C.BR.

The C.Br. is replete with factual error and twisted premises not supported by the record. Petitioner submits that the necessity to misstate and twist facts dramatizes the inherent weaknesses of the CFTC position on this review.

Pressner was not "Sundheimer's company" (C.Br. p.6 n.9) as Mr. Sundheimer owned no stock in Pressner (JA.530). There is no evidence that Pressner gained any profits from the subject transactions as claimed at C.Br. p.6 n.9. Indeed, the testimony relied upon by the CFTC to support this claim is "I don't think that that's right" (JA.475). Mr. Sundheimer's testimony strongly suggests that he was not present when any cash may have been

distributed (JA.474-5) and his lack of knowledge of these transactions reflected by the foregoing testimony indicates that he surely did not "preside" at any such meeting as claimed at C.Br. p.6 n.9.

Although the ALJ may have found that Mr. Sundheimer gave "careful attention to the mechanics of the trading" and that "Respondent's reasons for the activities * * * were to acquire financial gain" (C.Br. p.7), these conclusions are not in any way supported by the foregoing testimony or any other evidence in the record. The ALJ's decision is tainted by this error.

The prosecutor most familiar with Mr. Sundheimer's involvement advised Judge Broderick that Mr. Sundheimer "was not intimately involved in the operation of the scheme". (JA 558). The fact that Mr. Sundheimer knew after the fact that Prestner (the "we" in the testimony at C.Br. p.17) took lawful steps ("butterfly straddles") to limit risks of price fluctuation does not mean Mr. Sundheimer was involved in those steps at the time they were taken. The fact that such steps were taken does suggest little reliance on others' ability to manipulate markets.

The testimony of the witnesses as to Mr. Sundheimer's good character was not "based on knowledge gained prior to 1975" (C.Br. pp.8,19) nor was it "limited to Sundheimer's capability as a floor broker" (C.Br. pp.8,19) although, admittedly, that is what the ALJ erroneously concluded (JA.521) and his decision may be impeached for this erroneous conclusion.

Indeed, the testimony at the appendix citations listed at C Br. p.19 to support the CFTC's erroneous claim that the

highly credentialled witnesses testified on past knowledge clearly establishes that the views expressed by these witnesses were based upon both their past and their contemporaneous knowledge of Mr. Sundheimer*. The testimony at the appendix citations at C.Br. p.19 to support the CFTC's contention that these witnesses were not familiar with Mr. Sundheimer's conviction instead show remarkable familiarity with his conviction**.

* The following testimony contained at the appendix citations actually referred to by the CFTC at C.Br. p.19 for the claim of past tense testimony clearly refers to the witnesses' present tense opinion of Mr. Sundheimer.

Rubin: "I would not have any reservation about continuing to use him as a floor broker." (JA.183)

Corby: "I have ongoing contacts with him *** at least a couple of times a week." (JA.192)

Stern: "I have occasion to meet Mr. Sundheimer very frequently." (JA.211)

Herman: "Q.: Do you presently have an opinion? *** A.: *** extremely honest, reliable, competent broker and a good human being." (JA.269)

Mierefeld: "[H]e's known to be an honest broker." (JA.285)

Geraghty: "They prefer to use him". (JA.302)

Mintz: "I would use him in the future." (JA.511)

** The following testimony contained at the appendix citations actually referred to by the CFTC at C.Br. p.19 for the claim that the witnesses lacked knowledge of the conviction establishes that the witnesses had extensive knowledge of Mr. Sundheimer's conviction:

Rubin: "Q. Have you -- do you know of his conviction -- with respect to the crude oil?"
"A. Yes, I do." (JA.182)

Corby: "Q. Now concerning Mr. Sundheimer's conviction in crude oil, how did you become aware of that?"
"A. I first became aware of it on the C & S reporting of the indictment."

In respect of the CFTC's erroneous contention that the testimony was "limited to Sundheimer's capability as a floor broker" (C.Br. p.8) petitioner respectfully refers the Court to

(footnote cont'd)

Corby: "Q. Was he indicted?"
"A. I believe so. I'm not sure if that's the exact phrasiology, but there were some articles on C & S."
"Q. And he was named in those articles?"
"A. Yes." (JA.199-200)

Stern: "Q. Do you know that he was convicted in connection with crude oil trading?"
"A. I've heard of it, yes. I know of it."
* * *
"Q. Now are you aware of the details of his conviction in the U.S. District Court?"
"A. Not exactly; I know that he had pleaded guilty to a charge, but I don't know the details."
"Q. Do you know what it involved at all?"
"A. I understand that it involved some tax matters."
"Q. Do you know whether it was related to futures trading?"
"A. Yes, I think it had something to do with with futures trading." (JA.213,218)

Herman: "Q. You know, do you not, that he was convicted?"
"A. Yes."
"Q. Do you know that it related to tax concerns?"
"A. Yes."
"Q. And it was a felony?"
"A. Yes."
"Q. Do you know whether it was involved with any commodity futures trades?"
"A. It was involved with crude oil trade." (JA.269)

Mierefeld: "Q. Well, do you know of the conviction?"
"A. Yes, I do."
"Q. Do you know the conviction involved aiding and abetting false tax returns filing?"
"A. Yes, I do."
"Q. Do you know it involves -- which involved manipulated trades in crude oil?"
"A. Yes." (JA.284)

the quotations included at S.Br. pp.38-41 and note the constant repetition throughout this quoted testimony of the words "honest," "trust," "faith," "integrity," "open," "public interest," "reliable" and "good human being". Indeed, this testimony goes directly to the issue which the CFTC now concedes is the proper issue: "whether he established he can be trusted" (C.Br. p.18). In view of the substantial highly credentialled and unrebutted testimony in his favor, Mr. Sundheimer clearly met that test.

(footnote cont'd)

Geraghty: "Q. Are you aware of the fact that Mr. Sundheimer was convicted of a felony?"
"A. Yes."
"Q. And the nature of the felony?"
"A. Well, more or less. I mean I read what they had in The Times and on the Commodity News Service."
"Q. Would you tell the Court what you know?"
"A. It was manipulation of money, as I understand it, through the use of crude oil futures." (JA.303)

Sanborn: "Q. Now, do you know that he was convicted of a felony?"
"A. Yes."
"Q. Do you know what it involved -- it involved the trading in crude oil futures?"
"A. Yes."

* * *

"Q. The knowledge of Mr. Sundheimer's conviction that you have, where did you learn about his conviction?"
"A. I'm not sure exactly. I might have heard it from Mr. Sundheimer or I might have heard it from someone else in the business I was aware of what was going on."
"Q. You mean you were aware of the investigation?"
"A. I was aware of the trial."
"Q. Of the trial."
"A. Uh-huh."
"Q. So was that about when you first learned about the matter -- the crude oil matter -- was when the trial was taking place?"
"A. Probably just before the trial, when it was publicized." (JA.323-4,328)

The CFTC's most egregious twisting of fact occurs in its attempt to find some testimony in the record to cast some slight doubt upon Mr. Sundheimer's trustworthiness: Mr. Aspinwall's obvious shock and hurt over learning of alleged dereliction by a man for whom he obviously had a deep and paternal affection (C.Br. p.19 n.24). The CFTC deliberately withholds from the Court, however, the facts that (a) Mr. Aspinwall readily acknowledged knowledge of the conviction and that it did not adversely affect his opinion of Mr. Sundheimer's "honesty and integrity" (JA.337) and (b) what troubled Mr. Aspinwall was his cross-examiner's confronting him with the fact that "in this proceeding" Mr. Sundheimer "had been found to have violated the wash sales and fictitious trading and prearranged trading provisions" (JA.343), claims which in part were then, and in remaining part later proved to be, untrue. Indeed, the DE's constant confrontation of the character witnesses with these findings of violation which were, or were later held by the CFTC to be, erroneous, deprived the rehabilitaiton hearing of any semblance of fairness. (JA.204-5,220,276,293-5,315-6,329-32,397,429-30)

Contrary to the CFTC contention at C.Br. p.8, there was no evidence of any wrongful conduct after April 21, 1975; nor did Mr. Sundheimer admit "to such conduct through July 1976" (C.Br. p.9)*, nor is the fact of prearrangement itself a violation of the Act (C.Br. p.9).

Although the CFTC may have felt that the evidence did not persuade that Mr. Sundheimer "posed 'no unreasonable

* Indeed, the CFTC admits there was no such admission. (C.Br. p.17 n.23).

risks ***'" (C.Br. p.9 n.11), there was no evidence to support this feeling and feelings alone are not sufficient for an agency determination.

Although "prearranged trading" may strike the CFTC as "'nearly as egregious as market manipulation'" (C.Br. p.10) the Act does not prohibit prearrangement and the CFTC permits it by its own regulations. Reg. 1.38 of the CFTC's General Regulations.

Contrary to the innuendo of C.Br. p.16 the CFTC's 1980 Annual Report shows that it processed 3,076 floor broker registrations in 1979 and 4,015 in 1980. In any event, agency overwork is not an adequate ground to deny a person due process of law.*

I

THE CFTC CONCEDED ABSENCE OF PRIOR NOTICE OF THE CHARGE AGAINST HIM PREJUDICED MR. SUNDHEIMER

The C.Br. tacitly acknowledges that no notice was given Mr. Sundheimer that he was charged with "tantamount" behavior or that summary disposition was sought on the issue whether Pressner aided an accommodation trade or its "tantamount" until the actual CFTC decision that the transactions were "tantamount to 'accommodation trades'" (See S.Br. pp.8-9,11-14). Nor does the CFTC on this review attempt any excuse or explanation of its failure to afford Mr. Sundheimer his constitutionally protected right to prior notice.

* The CFTC has the unique advantage of a budget increase in this year of budget cuts.

The lack of notice seriously prejediced Mr. Sundheimer. He correctly ascertained that the charges specified in the summary disposition motion -- that he had prearranged trades and manipulated markets (JA.42) -- could not be sustained on the DE's own presentation. The CFTC upheld Mr. Sundheimer in this conclusion (JA.8 n.1, 16-17). Since the DE had not adequately supported its summary disposition assertions as required by §10.91 of the CFTC Rules of Practice, Mr. Sundheimer was not required to lay bare his proofs in evidentiary form to establish that he was not guilty of the violations alleged by the DE. Accordingly, Mr. Sundheimer submitted no proof, argued the motion on the law and prevailed as to the specific allegations made against him on the motion.

At his earliest opportunity to respond to the after the fact charge that his act was "tantamount to" an accommodation trade, Mr. Sundheimer submitted a factual Affidavit (JA.527 et seq.) in the context of a petition to the CFTC for reconsideration of the Order (JA.526) setting forth the facts which establish that he did not commit anything "tantamount to" an accommodation trade and that the acts which he did commit did not extend after April 21, 1975 when crude oil futures contracts first came under federal regulation.

The CFTC rejected Mr. Sundheimer's proffer of factual evidence on the ground that a petition for reconsideration

> "must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission." (JA.23)

Mr. Sundheimer not having been charged at any prior stage of the proceeding with any act "tantamount to" an accommodation trade, the CFTC's rejection of Mr. Sundheimer's factual presentation on the foregoing grounds was ironic and callous, Mr. Sundheimer was thereby wrongfully deprived of his substantial consitutional right to prior notice to enable him to establish his substantial consitutional right to a hearing.

II

THE CFTC'S CONCESSIONS AND ARGUMENT EVASIONS DRAMATIZE THAT MR. SUNDHEIMER'S GUILTY PLEA AND PLEA STATEMENT FALL SHORT OF ESTABLISHING A VIOLATION OF THE ACT

The CFTC acknowledges that Mr. Sundheimer's oral plea statement "of course, is only partial as to the four, or more, year scope of the conspiracy set forth in the information." [emphasis added] (C.Br. p.17 n.23). It also concedes that Judge Broderick would have had to question Mr. Sundheimer in terms referring to "two of the oil company's tax years" (C.Br. p.17) or "tax losses for a second year"* (C.Br. p.23) if the colloquy were to establish transactions extending into the period in which crude oil futures became regulated. In view of the CFTC acknowledgment at C.Br. p. 17 n.23, it is difficult to understand why in the main text of the C.Br. the CFTC insists on claiming that Judge Broderick referred to tax losses in two years. Judge Broderick never used those words or any words like them (S.Br.

* Tax straddles required transactions in two tax years: the initial transaction and a liquidating transaction early in the next year (JA.15 n.7).

p.5, JA.77). Accordingly, the pleading statement forms no basis for the grant of summary disposition (see discussion at S.Br. pp.17-25).

In arguing that the mere fact of the plea itself to the multi-element, single count Information establishes a violation of the Act after its effective date, the CFTC evades the issue. Substantial authority establishes that a mere plea to a single count, multi-element charging instrument, where, as here, conviction of any one element would be sufficient to sustain conviction under the instrument, does not establish any particular element charged (S.Br. pp.15-17). In face of this substantial authority the CFTC evades the issue by referring only to United States v. Rubin, 243 F.2d 900 (7th Cir. 1957) and the concurring minority opinion in Metros v. United States District Court for the Northern District of Colorado, 441 F.2d 313 (10th Cir. 1970) (C.Br. p.21).

Rubin, supra, involved a three count indictment. The court held only that a plea of guilty to the entire indictment established the essential elements of each count. In the present case, however, numerous possible grounds for a conviction at numerous possible times were intermixed in one count. Mr. Sundheimer's mere plea of guilty did not identify which possible violation he admitted or when it occurred and Rubin is therefore not relevant to the issues of this review.

Metros, supra, was a civil action for damages for wrongful issuance of a search warrant. The concurring opinion cited by the CFTC held only that the concurring judge would

limit the opinion to the issue of privilege because "the validity of the antecedent search is not shown *** to have been an issue essential to the conviction". 441 F.2d 318. Petitioner is at a loss to understand what such a minority opinion has to do with the issues now before this Court.

Accordingly, neither the fact of the plea nor Mr. Sundheimer's plea statement establishes any act in violation of the Act or that any act alleged occurred after the Act became applicable to crude oil fututes, and the CFTC's misleading discussion of the law and confusing discussion of the facts serves only to emphasize the CFTC's awareness that there is an unresolved factual issue as to what occurred and when it occurred and that summary disposition was erroneously granted and Mr. Sundheimer denied a hearing in violation of constitutional right.

III

THE CFTC CANNOT JUSTIFY ITS ATTEMPTED EXTENSION OF ITS JURISDICTION UNDER THE TANTAMOUNT HOLDING

The C.Br. addresses the CFTC's resort to the Tantamount Holding only once, and then in a short footnote (C.Br. p.29 n.32) suggesting that the Tantamount Holding is an "obvious semantic variation" of "of the character of" and "hardly *** an attempt *** to expand the statute." The CFTC had full opportunity on the reconsideration motion to correct the semantic variation and it chose not to do so. Since service of the S.Br. the CFTC has made no attempt to withdraw or clarify the Order. One must

assume that an agency deliberately says what it means, particularly where, as here, the agency takes more than one year to issue its decision. This being so, one must assume the CFTC deliberately set out to expand its jurisdiction.

"Of the character of" does not mean "tantamount to". "Of the character of" requires all the elements of a specific subject referred to as of a particular time (S.Br. p.27 n.); "tantamount to" suggests "not quite", and in this sense they are opposites. Should this expansion be sustained, how many agencies would be delighted to employ a similar device to escape the strictures constitutionally placed on their disciplinary powers (see S.Br. pp.30-33)? Even the affirmance without opinion of the already published, 2 Comm. Fut. L. Rep. (CCH) ¶21,245, "Tantamount Holding" is a green light to any other agency desiring to broaden its jurisdiction.

IV

THE CFTC FAILED TO CONCEIVE A NON-VAGUE DEFINITION OF "ACCOMMODATION TRADE" AND FAILED TO SHOW THAT ANY PROPOSED DEFINITION WOULD APPLY TO MR. SUNDHEIMER

The C.Br. alternately argues that "accommodation trade" should be defined in its "everyday meaning"* as "to assist another" in anything (C.Br. p.26) or as trades "outside the competitive scheme of the commodity futures market for the purpose

* No dictionary defines the term or defines "accommodation" as "assist". Contrary to C.Br. p.28, there is no "common usage of the term" accommodation trade. There was no testimony or other evidence below as to any "usage" of the term (See S.Br. p.7 n.).

of enabling or assisting another in an illegal trade." (C.Br. pp.28-29). The CFTC points to three related agency decisions which do not define "accommodation trades" as suggested in the C.Br. and which require fictitious trading as part of the definition, an element absent here. The C.Br. ignores the definitions of the Act's legislative history.

The first CFTC proposed definition, that of assisting another to do anything, is obviously too simplistic and incomplete to define a violation. The second definition, that of enabling or assisting another in an illegal trade also cannot be the meaning intended by §4c(a) since aiding, abetting, counselling, commanding, inducing or procuring an illegal trade is prohibited by Section 13(a) of the Act [7 U.S.C.A. §13c] and the definition here argued for by the CFTC would make the term "accommodation trade" merely a weak redundancy of the prohibition of Section 13(a).

Much of the CFTC's discussion of accommodation trading is in actuality a discussion of the desirability of conducting auction markets by open outcry and competitive bidding as mandated in most circumstances by Reg. §1.38 of the CFTC's General Regulations. There is no claim or showing, however, that the transactions which are the subject of Mr. Sundheimer's alleged activity were conducted in any manner other than "openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring *** during the regular hours prescribed by the contract market for trading in such commodity ***." Reg. §1.38 of the

CFTC General Regulations. Nor was Mr. Sundheimer charged in the DE complaint with any violation of Reg. 1.38 (JA.28-30). Accordingly, that discussion is not relevant to the present appeal.

Rejecting the clear definition of the Act's legislative history, the CFTC proposes three alternate means commonly used to determine the meaning of a statutory term in the absence of a clear statutory definition or definition by legislative history (C.Br. p.26): "common understanding" (absent here), "prior judicial construction" (also absent here) and "trade usage" (egregiously absent here since expert testimony could have been provided). As set forth at S.Br. pp.27-30 the legislative history of the Act is replete with definitions of accommodation trading which do not include any act which is the subject of the present proceeding, and there is no acceptable reason to exclude the legislative history of the Act as a preferred method where it clearly and copiously exists.

Moreover, the Marks and Eisen cases relied upon by the CFTC at C.Br. pp.27-28 in an attempt to expand and broaden the established definition of accommodation trade, deal with fictitious trades which the CFTC has specifically determined were not involved in the present proceeding (JA.16 n.9). In re Laiken, 23 Agric. Dec. 1193 (1964), cited by the CFTC at C.Br. p.28 n.31, does not deal at all with an accommodation trade and the term is not used in the decision by the Judicial Officer or in the decision on the review by this Court. Accordingly, the agency case law cited by the CFTC in an attempt to expand the definition of accommodation trade created by the legislative history of the

Act does not expand that definition to include the transactions which are the subject of the present proceeding.

The CFTC argues for an interpretation of the Act which favors its constitutionality (C.Br. pp.25-26). So does Mr. Sundheimer on this review, but Mr. Sundheimer argues that such an interpretation requires that the acts which are the subject of this proceeding be deemed not to be included in the term "accommodation trade" for the very purpose of preserving the constitutionality of the prohibition.

The CFTC's reliance upon United Housing Foundation, Inc v. Forman, 421 U.S. 837 (1975), is misplaced. By determining that a housing cooperative offering plan was not included within the securities laws' definition of "securities" and thereby limiting the jurisdiction of the Securities Exchange Commission, the Supreme Court did not adopt an expansive definitional rule authorizing agencies to expand statutory definitions over the years to give meanings to regulatory statutes never intended by Congress.

Mr. Sundheimer agrees that the test of whether an act is an accommodation trade "must largely be a practical one". (C.Br. p.28). The most practical test is to refer to the established definitions of "accommodation trade" and determine that they do not include the transactions which are the subject of this proceeding. The most practical test avoids the issue of constitutional vagueness.

V

THE CFTC'S SEVEN YEAR RULE MADE A SHAM OF MR. SUNDHEIMER'S HEARING ON REHABILITATION

Sixteen highly credentialled witnesses voluntarily testified to Mr. Sundheimer's present trustworthiness, the issue which the CFTC concedes was the issue with respect to the Revocation (C.Br. p.18). No one testified against. The only testimony which appears at first glance to have been shaken was that of Mr. Aspinwall cited at C.Br. p.19 n.24. But Mr. Aspinwall was shaken by a misrepresentation by the cross-examiner (see supra, p.11)*.

The Seven Year Rule means that there was no way to show Mr. Sundheimer's trustworthiness or that showing it by "extensive testimony" (C.Br. p.8) was a useless act. Accordingly, the Seven Year Rule, announced after the fact of the "extensive testimony" made a sham and mockery of the hearing. Why deceive Mr. Sundheimer into the embarrassment of asking his high ranking admirers for this "extensive testimony"? Why put him through the expense of a hearing? Why put an agency, which complains it has too many applications to process (C.Br. p.16) to the extent of holding and reviewing the hearing? The reason is that the CFTC is required to hold a meaningful hearing. The Seven Year Rule

* Contrary to the CFTC's contention in its footnote 24, Mr. Stern did not testify indicating "that a 'mere' run in with the criminal and regulatory authorities raises no questions in his mind as to a person's fitness" (C.Br. p 19 n.24). Mr. Stern testified that some exchange disciplinary proceedings involve serious infractions and some do not (JA.220-2).

made a mockery and sham of this hearing (see S.Br. pp.36-44), and Mr. Sundheimer was thereby wrongfully deprived of his right to a meaningful hearing.

VI

THE CFTC FAILED TO JUSTIFY THE IMPOSITION OF ITS HARSHEST SANCTIONS

The Sanctions are the harshest permitted under the Act as is the Revocation. The sole justification in the C.Br. for this admittedly harsh punishment is the claim that "prearranged trading, 'is nearly as egregious as market manipulation'"* (C.Br. p.10). Of course, "prearranged trading" is not mentioned in or prohibited by the Act, which is curious for such an "egregious" offense.

Rarely, perhaps never, is a Court presented with a situation where a primary offender who offers no evidence of mitigation or rehabilitation is sanctioned with so much more lenience than a passive acquiescor who came forward, impressed the prosecutor that he was not "intimately involved", cooperated performed public service diligently and offerred such substantial evidence of rehabilitation. The CFTC's sanctions undercut Judge Broderick's considered determination to punish Mr. Sundheimer at half the penalty he imposed on Mr. Nordlicht. The Sanctions and

* The statement in the C.Br. of the quotation from the Order is misleading. The Order did not at JA.20-21 refer to "prearranged trading" although the remainder of the quoted language is there

Revocation are grim warnings to the industry: Woe to ye who burden the CFTC with the exercise of your constitutional and statutory rights! The CFTC clearly acted arbitrarily and capriciously in imposing the Sanctions. (See S.Br. pp.44-48).

CONCLUSION

The CFTC appears as an agency run wild. It has denied Mr. Sundheimer his substantial constitutional rights to prior notice and an evidentiary hearing. It has exceeded its statutory authority. It made a sham of Mr. Sundheimer's hearing on rehabilitation. It imposed sanctions in a manner defying human understanding. The Order should be vacated.

Respectfully submitted,

BURNS & FOX
Attorneys for Petitioner
360 Lexington Avenue
New York, New York 10017
(212) 687-6290

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No. 82-1042

In the Supreme Court of the United States

OCTOBER TERM, 1982

STEPHEN M. SUNDHEIMER, PETITIONER

v.

COMMODITY FUTURES TRADING COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DENNIS A. DUTTERER
General Counsel

KENNETH M. RAISLER
Deputy General Counsel

DAVID R. MERRILL
Special Counsel
Commodity Futures Trading Commission
Washington, D.C. 20581

QUESTIONS PRESENTED

1. Whether the court of appeals erred in its conclusion that petitioner's guilty plea in a criminal tax case admitted activities constituting "transaction[s] * * * of the character of * * * accommodation trade[s]" in violation of the Commodity Exchange Act.

2. Whether the court of appeals erred in affirming the conclusion of the Commodity Futures Trading Commission that, under all the circumstances, petitioner's criminal guilty plea justified revocation of his registration as a commodities floor broker and the imposition of other administrative sanctions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 688 F.2d 150. The final opinion and order of the Commodity Futures Trading Commission is reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,245 (Sept. 16, 1981) and the Commission's subsequent opinion denying a petition for reconsideration is reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,270 (Oct. 16, 1981). The initial decision and order of the administrative law judge are reported at [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,020 (Feb. 15, 1980) and incorporate an earlier decision and order reported at [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,855 (July 13, 1979).[1]

[1] The opinions of the Commission and the administrative law judge are attached as Appendices A, B, C, and D to this brief.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1982. A petition for rehearing was denied on October 21, 1982 (Pet. App. A9). The petition for a writ of certiorari was filed on December 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 4c(a), 6(b), 6(c), 9, 8a(2) and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 6c(a), 9, 13b, 13, 12a(2) and 12a(3), are set forth at Pet. 3-10.

STATEMENT

On October 27, 1978, in the United States District Court for the Southern District of New York, petitioner pleaded guilty to a criminal information charging him with knowingly aiding, assisting and advising in the preparation of false and fraudulent income tax returns, in violation of 26 U.S.C. 7206(2) (Pet. App. A3). In pleading guilty to that felony, petitioner acknowledged that the tax fraud was accomplished through prearranged trades in crude oil futures contracts in which he had authorized his firm to participate (Pet. App. A3, A18).

On January 16, 1979, the Commodity Futures Trading Commission (CFTC) issued an administrative complaint pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act, 7 U.S.C. 9, 13b and 12a(3), alleging that petitioner, a convicted felon, was unfit to remain registered with the Commission as a floor broker (Pet. App. A3).[2] In light of petitioner's admitted

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[2] See Section 2(a)(1) of the Act, 7 U.S.C. 2, for a definition of the term "floor broker," and Section 4e, 7 U.S.C. 6e, for the requirement that all floor brokers be registered with the CFTC.

participation in prearranged trades and manipulation of the prices of crude oil futures contracts, it was also alleged that petitioner had violated, or aided and abetted violations of, Section 4c(a)(A) of the Act, 7 U.S.C. 6c(a)(A), which *inter alia*, prohibits transactions "of the character of" accommodation trades, and Section 9(b) of the Act, 7 U.S.C. 13(b), which forbids market price manipulations. The complaint sought an order revoking petitioner's registration, assessing a civil penalty of up to $100,000 per violation, requiring petitioner to cease and desist from violating the Act, and barring him from trading on any commodity exchanges and requiring all exchanges to refuse him trading privileges (App. A, *infra*, 2a).

The CFTC's Division of Enforcement moved for summary disposition of all allegations of the complaint pursuant to Commission Rule 10.91, 17 C.F.R. 10.91. The Division argued that petitioner's felony plea and conviction estopped him from contesting allegations encompassed by the criminal information (Pet. App. A3-A4). The administrative law judge agreed (App. D, *infra*, 33a-54a). He held that the guilty plea created a prima facie case of unfitness, and that Sections 9(b) and 4c(a)(A) of the Act had been violated (Pet. App. A4). In reaching this determination, the administrative law judge found that petitioner's conduct in prearranging trades in crude oil futures contracts did not end prior to April 21, 1975, the date the Act became applicable to crude oil futures (*ibid.*). Accordingly, the administrative law judge granted in part the motion for summary disposition, but reserved judgment on the imposition of sanctions pending a hearing at which petitioner could present evidence of mitigating circumstances and rehabilitation (*ibid.*).

Following the hearing, the administrative law judge concluded that petitioner had presented insufficient evidence to show mitigation and rehabilitation (Pet. App.

A4; App. C, *infra*, 21a-32a). Accordingly, the administrative law judge suspended petitioner's registration as a floor broker for six months, suspended his trading privileges for two years, ordered him to cease and desist from further violations of the Act, and fined him $200,000 (Pet. App. A4).

On appeal, the CFTC affirmed the administrative law judge's finding that petitioner was unfit to remain registered because of his felony conviction. (App. A, *infra*, 10a). The Commission also held that the guilty plea estopped petitioner from denying his participation in a scheme involving the prearrangement of trades in commodity futures contracts after April 21, 1975, and that this conduct constituted a violation of Section 4c(a)(A) of the Act (App. A, *infra*, 9a). However, the commission vacated the administrative law judge's holding that petitioner had violated Section 9(b) of the Act, because the guilty plea did not encompass all the elements necessary to establish a *prima facie* case of market manipulation (App. A, *infra*, 9a-10a). The Commission determined that petitioner's registration should be revoked rather than suspended, reduced the civil penalty to $100,000, and affirmed the remaining sanctions (*id.* at 14a).

The court of appeals affirmed the Commission's opinion and order in all respects (Pet. App. A1-A8).

ARGUMENT

The decision of the court of appeals is correct and is in accord with decisions of this Court and other federal courts that have reviewed the imposition of administrative sanctions. None of the issues presented warrants further review by this Court.

1. Petitioner contends that the Commission exceeded its statutory power in finding that the crude oil futures transactions in question violated Section 4c(a)(A) because they were "tantamount to 'accommodation trades'" (App. A, *infra*, 9a n.9). Section 4c(a)(A), ex-

pressly prohibits transactions "of the character of," or "commonly known to the trade as" accommodation trades. Petitioner's assertion is that the Commission's use of a semantic variation of the statutory phrase constitutes an impermissibly expansive interpretation of the statute (Pet. 23-28).[3] In rejecting this argument and upholding the Commission's finding, the court of appeals, while admonishing the Commission to adhere more closely to the exact language of the Act, correctly concluded that the Commission equated the terms "tantamount to" and "of the character of" (Pet. App. A5).

2. Petitioner also contends that the futures transactions in issue were not of the character of accommodation trades because they were not fictitious, but were trades actually executed on the floor of a commodity exchange (Pet. 21-23). In addressing this argument, the Commission noted that while the prearranged trades were real in the sense that they brought about an actual change in the market position of the parties involved,

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[3] Petitioner attempts to analogize the Commission's holding that the crude oil futures transactions were tantamount to accommodation trades to the former practice of the Securities and Exchange Commission of issuing a series of 10-day orders suspending trading of stock that this Court invalidated in *SEC* v. *Sloan*, 436 U.S. 103 (1978) (Pet. 25-26). That case, however, involved an agency's attempt to fashion a remedy in a form that was contrary to a clear and precise statutory provision. 436 U.S. at 117-119. Here the statutory provision does not address the type of remedy to be employed but rather the parameters of unlawful conduct, which the statute defines in the broadest of terms.

Petitioner also suggests that the court of appeals' determination upholding the Commission's finding of accommodation trades is in conflict with the holdings of other courts of appeals (Pet. 26-27). However, the cases cited by petitioner to support this assertion merely recite general propositions to the effect that expansive interpretations of statutory standards by administrative agencies must be given careful judicial review. None of these cases concerns Section 4c(a) or any other provision of the Commodity Exchange Act.

they were nonetheless tantamount to accommodation trades prohibited by the Act (App. A, *infra*, 9a n.9). The Commission based this conclusion on its finding that these prearranged trades furnished "a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk" (*ibid.*). In approving the Commission's analysis, the court of appeals noted that "[i]t is this intent, the absence of good-faith, arms-length trading, and the undisclosed prearrangement for losses and gains, that demonstrates the 'accommodation' nature of the transactions in the instant case" (Pet. App. A6).

Petitioner also claims that the prohibition against accommodation trades in Section 4c(a) of the Act is unconstitutionally vague (Pet. 28-30). Petitioner notes (Pet. 29) that the term "accommodation trade" is not defined in the Act. The court of appeals nevertheless concluded that there is no constitutional ambiguity in defining accommodation trade as the Commission did here because such a description conforms with the practical, everyday meaning of the phrase (Pet. App. A6). See *Precious Metals Associates, Inc.* v. *CFTC*, 620 F.2d 900, 907 (1st Cir. 1980); *British American Commodity Options Corp.* v. *Bagley*, 552 F.2d 482, 484-485 (2d Cir.), cert. denied, 434 U.S. 938 (1977). In addition, as the court of appeals recognized (Pet. App. A6), this everyday meaning is consistent with the prior administrative application of the term. See, *e.g.*, *In re Julian M. Marks*, 22 Agric. Dec. 761, 766-772 (1963); *In re Irwin M. Eisen*, 22 Agric. Dec. 758, 759 (1963); *In re Julian M. Marks*, 20 Agric. Dec. 457, 458-459 (1961).

3. Petitioner next contends that his due process rights were violated because the theory of the Commission's case and the violations of law with which he was charged were changed during the administrative process without first giving petitioner notice and affording

him an opportunity to oppose (Pet. 20-34). This contention has no basis in fact.

The Commission's conclusion that petitioner's conduct involved engaging in transactions tantamount to accommodation trades was based squarely on the administrative complaint that the transactions "'were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales * * *'" (App. A, *infra*, 1a n.1). The fact that the Commission did not sustain the administrative law judge's conclusion that petitioner had engaged in "fictitious" sales does not, therefore, establish that petitioner did not have adequate notice of the charges.

4. Petitioner asserts that ambiguities in his plea of guilty and pleading allocution made it improper for the Commission to conclude that petitioner had admitted engaging in prearranged trades after April 21, 1975, when the Act became applicable to trading in crude oil futures. In reaching this conclusion, which was specifically upheld by the court of appeals (Pet. App. A3-A5), the Commission was guided by this Court's opinion in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). See App. A, *infra*, 5a. In *Emich Motors*, the Court held that a party in a subsequent civil proceeding is "entitled to introduce [into evidence a] prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." 340 U.S. at 569. The Commission applied this standard and concluded that the administrative law judge, after making a careful examination of the record of the plea proceeding, had properly determined that petitioner's plea included an admission that prearrangement of trades continued after April 21, 1975 (App. A, *infra*, 7a-9a).

5. Finally, petitioner contends that in concluding that petitioner had not been rehabilitated, the Commission

improperly ignored the evidence of rehabilitation and instead made the passage of time the determinative factor in its decision (Pet. 39-40). In rejecting petitioner's evidence of rehabilitation, the Commission concluded that "[b]ecause of the gravity of respondent's violation of the Act, we believe that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred * * *" (Pet. App. A7; App. A, *infra*, 12a n.13). As the court of appeals recognized (Pet. App. A7), the passage of time is a relevant factor. Separate from this criterion, the Commission gave serious consideration to the evidence of rehabilitation (App. A, *infra*, 11a n.13), and its resulting determination was correctly upheld by the court of appeals (Pet. App. A8).[4] Although the court noted some concern with the Commission's choice of language, its review of the entire record led it to conclude that the sanctions imposed did not constitute an abuse of discretion (*ibid.*). The court also observed (*ibid.*) that "[p]etitioner may reapply * * * for registration. *Silverman* v. *Commodity Futures Trading Commission*, 562 F.2d 432, 439 (7th Cir. 1977). Should the Executive Director reject petitioner's application without giving him a further hearing on the question of rehabilitation, *see* 17 C.F.R. § 3.20(e)(f), or should the Commission fail to give petitioner a fair hearing accompanied by proper consideration of all the evidence, petitioner's claim of prejudice may then be viewed in a different light."

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[4] The administrative law judge had also seriously considered petitioner's evidence of rehabilitation (App. C, *infra*, 24a-28a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

DENNIS A. DUTTERER
General Counsel

KENNETH M. RAISLER
Deputy General Counsel

DAVID R. MERRILL
Special Counsel
Commodity Futures Trading Commission

FEBRUARY 1983

APPENDIX A

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UNITED STATES OF AMERICA
Before the
COMMODITY FUTURES TRADING COMMISSION

In the Matter of	:	CFTC Docket No. 79-22
Stephen M. Sundheimer,	:	OPINION and ORDER
Respondent	:	

This proceeding was initiated on January 16, 1979 when a complaint was filed pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act ("Act"), as amended, 7 U.S.C. §§9, 13, and 12a(3) (1976), alleging that Stephen M. Sundheimer had been convicted of aiding and abetting the filing of false tax returns in violation of 26 U.S.C. §7206(2), a felony, and hence was unfit to be registered as a floor broker. It was also alleged that respondent had violated Sections 4c(a) and 9(b) of the Act insofar as he had admitted to prearranging trades 1/ and manipulating prices of crude oil futures contracts traded on the New York Cotton Exchange, respectively, while pleading guilty to a criminal information charging him with such activities in connection with the filing of false tax returns. 2/

1/ None of the subsections of Section 4c(a) of the Act proscribe "prearranged trading" in haec verba. However, the Division of Enforcement in the complaint averred, inter alia, that respondent's prearranged transactions "were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales, or which were used to cause prices to be reported, registered, or recorded which were not true and bona fide prices, in order to create predetermined losses and gains in commodity futures accounts" (Complaint at 2). These allegations, if proven, would establish violations of Sections 4c(a)(A) and (C) of the Act. See note 9, infra.

2/ On October 27, 1978, respondent pleaded guilty to a criminal information charging him with aiding and abetting the filing of false tax

(footnote continued)

Based on the foregoing, the Division of Enforcement sought a cease and desist order; an order revoking respondent's registration as a floor broker; an order prohibiting Mr. Sundheimer from trading on or subject to the rules of any contract market; and a civil money penalty (Complaint at 3).

On March 19, 1979, respondent filed an answer admitting the guilty plea and conviction, but denying unfitness. Upon motion of the Division of Enforcement, Administrative Law Judge Robert E. Duncan partially granted summary disposition, finding that the Division of Enforcement had made a prima facie showing that Mr. Sundheimer is unfit to be registered as a floor broker by virtue of his felony tax conviction in federal district court and the underlying prearrangement of trades and price manipulation

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2/ (footnote continued)

returns in violation of 26 U.S.C. §7206(2). It was also charged in the information that respondent

> (on behalf of Pressner Trading Corporation, of which at all times relevant to this Information he was vice-president), together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years.

(Motion for Summary Disposition, Exhibit II, at 1.)

On January 9, 1979, the United States District Court for the Southern District of New York entered a judgment of conviction against respondent for "unlawfully, willfully and knowingly aid[ing], assist[ing] and advis[ing] in the preparation of false and fraudulent income tax returns (Title 26, United States Code, Section 7206(2))." (Motion for Summary Dispositions, Exhibit I). Respondent was thereupon sentenced to imprisonment for one year and was fined $5,000. This sentence was suspended and Mr. Sundheimer was placed on probation for one year with a special condition that he devote one year to some community activity on a full-time basis. In fulfillment of this condition, respondent served as a technical assistant full-time with the Bureau of Environmental Protection of the New York State Attorney General's office for one year without pay.

in crude oil futures (Order Granting Summary Disposition at 16).[3] Moreover, the judge found that because of admissions made during his guilty plea for the filing of false tax returns the doctrine of collateral estoppel precluded respondent from denying that he violated Sections 4c(a) and 9(b) of the Act. Id., at 15.[4] However, respondent was afforded an opportunity to offer

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3/ The Administrative Law Judge also granted summary disposition as to whether respondent's activities involving manipulation and pre-arranged trading postdated April 21, 1975, the date upon which the Act was made applicable to crude oil and whether Section 9(b) — which provides criminal penalties for manipulation, a felony under that section — can be the basis for civil sanctions imposed under the Act. (Order Granting Summary Disposition, at 2-3.) The judge resolved all of these questions affirmatively.

4/ In this regard, the Administrative Law Judge stated:

> Respondent contends that any collateral estoppel pertaining to his conviction is limited to his crime and his 'crime was that he aided and abetted the filing of a false tax return in 1974 and in admitting his guilt he did not admit to all of the matters charged in the information.' The record, however, does not support this contention. At the hearing before the District Court on October 27, 1978, Respondent without reservation pleaded guilty to all the facts charged in the Information, supra at paragraph 6. Respondent correctly argues that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U.S. 558, 568-569 (1951). Where there is a guilty plea the truth of the averments in the information is admitted. United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Judge Holloway, concurring in the result). (Order Granting Summary Disposition, at 15.)

The judge thereupon concluded that respondent was collaterally estopped from denying that he engaged in fictitious sales and manipulation in violation of the Act. (Order Granting Summary Disposition, at 14.)

evidence on the issues of mitigation and rehabilitation at an oral hearing held on July 25, 26 and 27, 1979, in New York, New York, at which time sixteen witnesses, in addition to respondent, testified on these questions.

On February 15, 1980, the Administrative Law Judge filed an initial decision in which he found that the evidence of mitigation presented by respondent was insufficient to offset the gravity of his violations of the Act. He also found that the evidence presented by Mr. Sundheimer did not establish that Mr. Sundheimer was sufficiently rehabilitated to permit registration or to conclude that sanctions under the Act would be unwarranted. Accordingly, the judge ordered Mr. Sundheimer to cease and desist from further violations of Sections 4c(a) and 9(b) of the Act; suspended his registration as a floor broker for six months; prohibited him from trading on or subject to the rules of any contract market for twenty-four months; and assessed Mr. Sundheimer a civil money penalty in the amount of $200,000.

Respondent has appealed to the Commission, challenging the judge's findings that he violated the Act, as well as the severity of the sanctions imposed against him. The Division has cross-appealed arguing that Mr. Sundheimer's registration as a floor broker should be revoked, not merely suspended. After consideration of the record and all of the issues raised and briefed by the parties on appeal, we have determined to affirm the determination of unfitness made by the Administrative Law Judge.

I.

In our view, Stephen M. Sundheimer is unfit to be registered with the Commission because of his felony conviction and because the admissions which respondent made in pleading guilty establish that he violated Section 4c(a)(A).

of the Act.[5/] We hold also that Mr. Sundheimer is estopped from disputing the factual bases for this conclusion. However, we have also determined that the mere use of the word "manipulated" in the criminal information without more specific detail does not establish that respondent actually manipulated the crude oil market as prohibited by Section 9(b) of the Act.

In deciding whether the ultimate judgment of guilt in respondent's earlier criminal case has any collateral estoppel effect in this proceeding, the Supreme Court's opinion in Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951), is instructive. In Emich Motors, the Court ruled that a party in a subsequent civil proceeding "is entitled to introduce [into evidence a] prior judgment to establish prima facie all matters of fact and law necessarily decided by the conviction and the verdict on which it was based." 340 U.S., at 569 (emphasis added). Noting that there may be a difficulty in determining "what matters were adjudicated in the antecedent suit," id., the Court indicated that trial judges in future cases must "examine the record of the antecedent case to determine the issues decided by the judgment." 340 U.S., at 572. We are satisfied that the Administrative Law Judge in accordance with Emich Motors conducted an examination of the record of the respondent's guilty plea proceeding to ascertain what matters were necessarily decided by that proceeding.

It is worth noting here that a knowing and voluntary plea of guilty to a criminal charge constitutes an admission of all the material facts alleged in the indictment or information, see, e.g., McCarthy v. United States, 394 U.S. 459, 466 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927); United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). In the

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5/ See note 9, infra.

earlier proceeding, Mr. Sundheimer entered a plea of guilty to a criminal information charging him with filing false tax returns by fraudulently prearranging trades and manipulating prices of crude oil futures. Although respondent was ultimately convicted of the tax offense only, our examination of the record leads us likewise to the conclusion that the information was sufficiently specific and respondent's prearrangement of trades was so integrally related with his tax offense that all the activities specified in the information, including those which constituted violations of the Act, were "necessarily decided" as the factual basis for his plea of guilty to the tax offense.[6/]

6/ When the guilty plea was taken in district court, Mr. Sundheimer was questioned by the court concerning the circumstances upon which the plea was based:

[By the Court:] Q. Mr. Sundheimer, I want you, in your own words, to tell me just what it is that you did that is the foundation for your decision to plead guilty to the information.

[By Respondent:] A. Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.

I gave my consent to that arrangement and I was present when it was made.

Q. And your consent was necessary to the making of that arrangement?

A. Yes, it was, your Honor.

(footnote continued)

It is on this basis that we disagree with Mr. Sundheimer that, notwithstanding his plea of guilty to all matters alleged in the information, he did not admit that the prearranged trades occurred on or after April 21, 1975. He argues on appeal that "there is simply no evidence [in the record] that respondent engaged in unlawful conduct in [sic] or after April 21, 1975" the date on which the Commodity Exchange Act was made applicable to crude oil futures (Respondent's Brief at 26).

As mentioned previously, the criminal information to which respondent pled guilty charged him with "creating predetermined losses . . . for the

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6/ (footnote continued)

Q. And did you understand that the purpose of that arrangement was to enable the oil company to take certain tax losses on its corporate tax return?

A. Yes, I did, your Honor.

Q. And did you also then give your consent to a similar arrangement for the following year?

A. I think that it was implicit in the initial understanding. There was no additional consent required.

Q. Are you in good health today, Mr. Sundheimer?

A. I hope so.

[By the Court:] Very well, gentlemen. I shall accept the plea. (Order Granting Summary Disposition In Part, Exhibit III, at 9-11.)

Furthermore, Stephen Sundheimer was questioned by the court:

Q. On an information filed this day, October 27, 1978, how do you plead to this information?

A. I plead guilty, sir.

(Id. at 11.)

fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following fiscal years" (Motion for Summary Disposition, Exhibit II, at 2; emphasis added). Given the nature of straddles intended to result in a tax benefit, a "gain" transaction in "the following fiscal year" necessarily requires trading activity within that year.[7] It therefore follows from the quoted language that respondent's unlawful activities and consent carried into the fiscal year commencing November 1, 1975 and ending October 31, 1976—the fiscal year following that ending October 31, 1975—and, thus, after the date on which the Act became applicable to trading in crude oil futures.[8] On that basis, we conclude that respondent is also estopped from denying his participation in a scheme involving the prearrangement of commodity

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7/ In typical commodity straddle transactions that are intended primarily for tax benefit, a trader buys and sells an equal number of contracts of a commodity in different delivery months. It is hoped that any market price movement will result in a loss on one side, or leg, of the straddle and a gain of a roughly equivalent amount on the other leg. The trader then seeks to liquidate the losing side in the present tax year, as pertinent here, the year ending October 31, 1975. If successful, the trader then claims a loss in that accounting period, while the other leg of the straddle, the one showing a profit, is not intended to be liquidated until the following tax year, in this case the year ending October 31, 1976. This is designed effectively to shift what might otherwise be taxable income from one year to the next.

8/ Mr. Sundheimer's testimony at the guilty plea proceeding, the relevant portion of which is set forth in note 6, supra, is not inconsistent with this conclusion. Respondent explained to the court that "sometime in the fall of 1974" he authorized prearranged trades which "ultimately" — meaning the following year as respondent was speaking about tax straddles — enabled an oil company to obtain tax benefits. He further testified that he consented implicitly to a similar arrangement for the following year, i.e., respondent authorized additional prearranged transactions which enabled an oil company to take losses in that year — fiscal 1975 — and ultimately to obtain tax gains in the following year — or fiscal 1976. Further, Count I of the information specified that Mr. Sundheimer's assistance in the tax fraud scheme extended until July 19, 1976.

futures transactions after April 21, 1975 and that this constituted a violation of Section 4c(a)(A) of the Act.[9/]

Turning then to the second count of the administrative complaint, the Commission is not persuaded that a guilty plea to a criminal information charging merely that respondent "manipulated the movement of prices on the Crude Oil Market" in the context of a false tax return case prosecuted by the Department of Justice necessarily establishes all the elements of a market manipulation as proscribed by the Commodity Exchange Act. To be sure, the "methods and techniques of manipulation are limited only by the ingenuity of man." Cargill, Inc. v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972). Nevertheless, while the prearranged transactions were necessarily a part of respondent's overall tax evasion scheme, it does not follow that the transactions resulted in a market manipulation.[10/] Since there is an inadequate basis in this record

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9/ Section 4c(a)(A) prohibits persons from engaging in transactions involving any commodity: "if such transaction is, is of the character, or is commonly known to the trade as a 'wash sale', 'cross trade,' 'accommodation trade', or is a fictitious sale." Insofar as the prearranged transactions to which Mr. Sundheimer admitted were real trades, that is, they brought about an actual change in market position between respondent's company and the oil company, see Tr. — 379-80, they did not constitute "fictitious sales" as proscribed by Section 4c(a)(A). Therefore, the judge's conclusion in this regard is vacated. However, respondent's prearranged transactions did furnish the oil company with a vehicle for utilizing a commodity futures market for extrinsic advantage without exposure to market risk, and to that extent, they were tantamount to "accommodation trades" which are also prohibited by Section 4c(a)(A) of the Act.

10/ Without purporting to delimit the parameters of manipulation, we would note that, in general, the elements of the offense include a person's ability to affect price levels or trends in the affected contract and market, the intentional exercise of that power, and an effect on price resulting from that exercise.

to support a conclusion that the activities of Mr. Sundheimer in fact caused a manipulation, we conclude that the Administrative Law Judge erred in his assessment that the Division established prima facie that respondent violated Section 9(b) of the Act and we vacate his holding in that regard.[11/]

II.

As noted above, the Division has cross-appealed challenging the judge's order merely to suspend Mr. Sundheimer's registration as a floor broker, arguing that it should be revoked. Mr. Sundheimer has endeavored to persuade us that we should not do so. We agree with the Division.[12/]

By virtue of Section 8a(3) of the Act, the Commission is empowered to revoke the registration of a person who has committed a felony. Therefore, Mr. Sundheimer's conviction for the filing of false tax returns, a felony, justifies revocation of his registration. See 7 U.S.C. §12a(2)(B) as incorporated in §12a(3). And we have also concluded that Mr. Sundheimer engaged in prearranging trades in the crude oil market. This conduct constitutes a serious violation of the Commodity Exchange Act.

11/ We wish to emphasize that this conclusion is based on the record as it exists herein. The only evidence produced by the Division of Enforcement was the criminal information and the testimony of Stephen Sundheimer at his guilty plea proceeding. Nothing in this decision should be construed to mean that the Commission has analyzed the facts and circumstances underlying respondent's guilty plea and testimony or the conduct of other persons involved with Mr. Sundheimer in his tax fraud scheme. Further, we do not mean to suggest that a guilty plea in other circumstances might not bare sufficient detail to establish a market manipulation in the full measure of proof required under the Commodity Exchange Act.

12/ An administrative agency may increase a sanction beyond that imposed by an administrative law judge. Fink v. Securities and Exchange Commission, 417 F.2d 1058, 1059 (2d Cir. 1969); Hanly v. Securities and Exchange Commission, 415 F.2d 591, 599 (2d Cir. 1969). See Silverman v. Commodity Futures Trading Commission, 562 F.2d 432, 438 (7th Cir. 1977).

Moreover, as a floor broker, Mr. Sundheimer's participation in prearranged trading, apart from being a violation of law, breached the duty that commodity professionals owe, not only to the futures market but also to those who rely upon their bona fides. We believe that it is our trust to assure beyond all question that "the highest ethical standards prevail" in every facet of the commodity futures industry and that breaches of those standards must be answered in kind. Cf. Commodity Futures Trading Commission v. J.S. Love & Associates Options, Ltd., 422 F. Supp. 652, 659 (S.D.N.Y. 1976). And "Congress invested the Commission with revocation power to safeguard the public interest in the well being of the nation's commodity futures markets." Silverman v. Commodity Futures Trading Commission, 562 F.2d 432, 439 (7th Cir. 1977).[13/] To insure against such conduct in the

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13/ In In the Matter of Carl M. Tipton, Jr., [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,673 (September 22, 1978), aff'd mem., No. 78-3581 (6th Cir. Oct. 3, 1980), at 22,750, we stated

> although the burden of producing a sufficient quantum of evidence to establish prima facie unfitness initially is on the Division, the ultimate burden — the burden of persuading the Commission that he is not unfit for registration — is squarely on the applicant once the prima facie showing has been made.

Upon consideration of Mr. Sundheimer's proffered evidence of rehabilitation and mitigation, and in light of his past misconduct, the Commission is not persuaded that Mr. Sundheimer's continued registration would present no substantial risk to the marketplace. Cf. In the Matter of Claus-Peter F. Schreiber, CFTC Docket No. 78-8 (Commission Order filed March 17, 1981). The Commission is not insensitive to the fact that respondent has already performed one year of full-time community service in lieu of imprisonment for the same duration. See n. 2, supra. But this was nothing more than payment of the debt owed as the result of respondent's felony tax conviction, which involves different policy considerations and a different social purpose. And Mr. Sundheimer's proffered evidence of rehabilitation

(footnote continued)

future and to serve as a warning to others, we conclude that the public interest policies of the Act can best be served by revocation, not merely suspension, of Mr. Sundheimer's registration as a floor broker.

We also find the twenty-four month suspension of respondent's trading privileges to be particulary appropriate. It is apparent that the unlawful trading activity was carried out with Mr. Sundheimer's authorization for the benefit of his own company. This conduct, while not causing injury to customers, as far as the record shows, was a serious violation and a direct abuse of his market trading privileges. A denial of those privileges will serve as a signal to others and to protect the market at least for the period of the trading prohibition. Cf. Haltmier v. Commodity Futures Trading Commission, 554 F.2d 556, 564 (2d Cir. 1977).

Finally, in furtherance of the remedial policies of the Commodity Exchange Act and to deter others in the industry from committing similar violations of the Act, we find it necessary to impose a civil money penalty

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13/ (footnote continued)

has received serious consideration by the Commission. However, in Tipton, supra, at 22,750, we stated that

> the applicant's failure to persuade the Commission that the public interest will not be disserved by his registration will be fatal to his application. Indeed, if the Commission, after considering the evidence offered by the applicant, retains any doubt as to whether or not the public interest dictates a refusal of registration, the applicant will not be registered.

Because of the gravity of respondent's violation of the Act, we believe that rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred such that registration poses no unreasonable risks to the commodity futures markets and to the public.

against Mr. Sundheimer.[14/] In determining the amount of such penalty, we have focused primarily upon the gravity of respondent's violation, that is, his participation with others for the purpose of financial gain in prearranging the trades, the deliberate intent on the part of respondent and the fact that respondent's participation in the prearranged trading scheme continued for at least two years. All reflect to respondent's detriment in our consideration of the gravity of his violation. The Administrative Law Judge found Mr. Sundheimer's net assets to be worth more than $1,000,000. (Initial Decision, at 11.) While respondent complains that most of those assets are illiquid,[15/] he does not challenge the judge's computation of his net worth. Since this offense is nearly as egregious as market

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14/ See Section 6(d) of the Act.

15/ Respondent has also raised the argument that the Administrative Law Judge's assessment of a civil money penalty must be set aside because the judge failed to consider that most of his assets are not liquid and thus not readily available for the payment of a fine. We consider this argument to be frivolous; there is no basis in law to conclude that the nature of a respondent's assets requires the government to stay its hand in imposing a monetary sanction.

The Administrative Law Judge considered Mr. Sundheimer's ability to continue in business in determining the amount of the penalty, and found his net assets to be a relevant factor in figuring respondent's ability to continue in business (Initial Decision at 11). Respondent argues that because it was established that he is a person "whose primary business involves the use of the commodity futures markets," under Section 6(d) of the Act, it was error for the judge to consider his net assets or net worth as factors in assessing the amount of the penalty (Respondent's Brief, at 47).

We have a slightly different view, given our determination to revoke Mr. Sundheimer's registration. We have made the ultimate determination that Mr. Sundheimer is unfit to "continue in business on the basis of his present registration." Therefore, while that factor must be considered by the Commission where a termination of registered status is not contemplated or where the respondent's business activities did not require registration, consideration of respondent's ability to continue in business has become moot under the circumstances presented here. Moreover, the net worth of respondent to the extent that standard is applicable here, is more than sufficient to sustain the civil money penalty imposed here.

manipulation, the gravest offense under the Act, a civil money penalty of $100,000 is appropriate here. Accordingly, the $200,000 penalty imposed upon Mr. Sundheimer by the Administrative Law Judge is remitted to that amount. 16/

Upon consideration of the record as a whole, all arguments raised and briefed by the respondent on appeal and in accordance with a preponderance of reliable, probative and substantial evidence, IT IS ORDERED that the registration of Stephen M. Sundheimer as a floor broker is HEREBY REVOKED. IT IS FURTHER ORDERED that respondent cease and desist from further violations of Sections 4c(a)(A) of the Act; that respondent be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four months. Respondent is also ordered to pay a civil money penalty in the amount of $100,000 within thirty days of notice of this order.

By the Commission (Chairman JOHNSON and Commissioners DUNN, GARTNER and STONE).

Jane K. Stuckey
Secretary of the Commission
Commodity Futures Trading Commission

Dated: September 16, 1981

16/ Under Section 6(d) of the Act, the Commission is empowered to impose a civil monetary penalty against a respondent who has violated the Act up to $100,000 per violation. The Administrative Law Judge's imposition of a penalty in the amount of $200,000 against respondent was based in part on his conclusion that Mr. Sundheimer had violated both Sections 4c(a) and 9(b) of the Act. See Initial Decision at 10-11. Because we have vacated the judge's determination that respondent engaged in manipulation, the $100,000 assessed for this offense is required to be withdrawn under Section 6(d) of the Act.

APPENDIX B

UNITED STATES OF AMERICA
before the
COMMODITY FUTURES TRADING COMMISSION

CFTC
OFFICE OF
HEARING CLERK
Oct 16 9 35 AM '81

In the Matter of	
Stephen M. Sundheimer,	CFTC Docket No. 79-22
Respondent	ORDER

On September 16, 1981, the Commission issued its final opinion and order in the above-captioned proceeding in which it determined that respondent Stephen M. Sundheimer was unfit for continued registration because he had been convicted of filing false tax returns in violation of 26 U.S.C. §7206(2), a felony. The Commission also determined that Mr. Sundheimer participated in a prearranged crude oil futures trading scheme in violation of Section 4c(a)(A) of the Commodity Exchange Act, as amended, 7 U.S.C. §6c(a)(A) (1976). On those bases, the Commission revoked Mr. Sundheimer's registration as a floor broker, ordered respondent to cease and desist from further violations of Section 4c(a)(A) of the Act, ordered that respondent be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four months, and assessed a civil money penalty of $100,000 against Mr. Sundheimer.

On October 1, 1981, Mr. Sundheimer filed a "petition for reconsideration" of the Commission's September 16 opinion and order. Respondent also filed on that date a motion for a stay of the Commission's opinion and order "pending determination of the petition for reconsideration and of the appeal of that order to the United States Court of Appeals for the Second Circuit."[1/]

1/ On October 1, 1981, respondent also filed a notice of appeal of the Commission's opinion and order in the United States Court of Appeal for the Second Circuit. Mr. Sundheimer sets forth his grounds for appeal at the end of his petition for reconsideration.

On October 8, 1981, the Division of Enforcement filed responses opposing both the petition for reconsideration and the motion for a stay.

The standard against which respondent's petition for reconsideration must be judged is Commission Regulation 10.106, 17 C.F.R. §10.106 (1981) which provides that "[a]ny petition filed under this subsection must be confined to new questions raised by the opinion or order and concerning which the petitioner had no opportunity to argue before the Commission." In our view, respondent's petition does not meet this standard, and, therefore, should be denied. In addition, we believe that inasmuch Mr. Sundheimer's motion for a stay articulates no adequate justification for the Commission granting a stay, it should likewise be denied.

In his petition, Mr. Sundheimer sets forth several criteria as bases for reconsideration by the Commission of its opinion and order. None of those criteria pose "new questions raised by the opinion and order" about which he did not previously have an opportunity to argue before the Commission. Foremost among what might be considered "new" matters raised by respondent[2/] as a basis for reconsideration is his argument that the Commission has not considered the passage of time since the July 1979 hearing as evidence of rehabilitation. To that end, Mr. Sundheimer argues that the absence of "any complaint by any member of the public, any member of any exchange, or any enforcement agencies" constitutes new and additional evidence of his rehabilitation. (Petition, at 3.) Another new matter raised by respondent is his averment that his company, Pressner Trading Company, voluntarily dis-

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2/ Although these may be considered new matters raised by respondent at this juncture, they are not "new questions raised by the opinion and order and concerning which the petitioner had not opportunity to argue before the Commission." Commission Regulation 10.106.

continued its operations as a futures commission merchant in order to preserve the positive image of the futures industry, because several of the company's officers had been under criminal indictment. (Petition, at 11-12.)

Mr. Sundheimer's first "new" matter presupposes that the Commission failed to consider the complete passage of time that has elapsed since his participation in the prearranged trading scheme in arriving at its determination that respondent was insufficiently rehabilitated. However, it has only been within the past few weeks that the Commission has actually considered whether Mr. Sundheimer was rehabilitated, and it was concluded that "rehabilitation in a case like this requires a much greater passage of time before any such evidence can persuade us that rehabilitation has in fact occurred such that registration poses no unreasonable risks to the commodity futures markets and to the public." Opinion and Order, at 12 n. 13. It was presumed at that time that Mr. Sundheimer had obeyed the law — as he was required to do — between July 1979 and Commission consideration. Thus, respondent's argument provides no basis for reconsideration.

Respondent's other "new" matter raised concerns a voluntary discontinuance by Pressner Trading Company of its operations as a futures commission merchant to preserve the positive image of the futures industry. While this matter may be viewed as a commendable gesture, it is not pivotal on the issue of whether the public interest dictates that sanctions be imposed against respondent. Mr. Sundheimer's illegal conduct was an abuse of the commodity futures markets and his license as a floor broker, irrespective of any involvement of Pressner Trading Company in its capacity, or role, as a futures commission merchant. While discontinuance of Pressner's operations

as a futures commission merchant may foreclose an avenue by which respondent may commit unlawful activity, only revocation of respondent's individual registration as a floor broker and a prohibition of his trading privileges will ensure that further opportunities for abuse of the markets on his part are foreclosed. As the Commission recognized in its opinion and order, the cease and desist order and the civil money penalty are necessary to protect the public interest and to deter respondent and others in the industry from committing similar violations of the Act in the future.

The other questions raised by respondent's petition cannot be considered "new." Mr. Sundheimer previously had the opportunity to argue all such questions before the Commission, and the Commission, in fact, addressed most of them in its opinion and order.[3/] Accordingly, we have concluded that respondent's petition for reconsideration fails to satisfy the standard enunciated in Commission Regulation 10.106, and on that basis, the Commission HEREBY ORDERS that Mr. Sundheimer's petition for reconsideration is DENIED.

3/ The other matters raised by respondent which cannot be considered to raise "new questions" are: that the Commission failed to appreciate fully respondent's proferred evidence of rehabilitation and mitigation (Petition, at 8-9); that the unlawful prearranged crude oil futures trades were not executed by Mr. Sundheimer personally (Petition, at 4); that it was implicit that respondent's participation in the prearranged crude oil futures trading scheme terminated before April 21, 1975, the date upon which the Commodity Exchange Act became applicable to crude oil futures (Petition, at 7); and , finally, that respondent's economic livelihood derives solely from his ability to trade in commodity futures, and he has no other business experience from which to earn a living (Petition, at 11).

In a footnote, Mr. Sundheimer also complains that he received harsher sanctions than an "active participant" in the same prearranged trading

(footnote continued)

As mentioned earlier, Mr. Sundheimer has also filed a motion for a stay of the Commission's opinion and order "pending determination of the petition for reconsideration and of the appeal of that order to the United States Court of Appeal for the Second Circuit." Respondent has not proffered any other justification for a stay beyond the motion for reconsideration which we have just considered and denied. Under the circumstances, we are not persuaded that the public interest will best be served other than by applying the sanctions ordered against Mr. Sundheimer at the earliest possible

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3/ (footnote continued)

scheme. See Petition, at 6. Respondent is referring to a Mr. Jules Nordlicht, secretary-treasurer of Pressner Trading Company during the relevant time period. Nordlicht was named as a respondent in a separate Commission proceeding. That proceeding was resolved by way of summary disposition wherein the Administrative Law Judge concluded that Mr. Nordlicht, inter alia, had engaged in "fictitious sales" in violation of Section 4c(a) of the Act, 7 U.S.C. §6c(a) (1976), and that he intentionally manipulated the crude oil futures markets, in violation of Section 9(b) of the Act, 7 U.S.C. §13(b) (1976). In the Matter of Jules Nordlicht, 2 Comm. Fut. L. Rep. (CCH) ¶21,027 (February 14, 1980). Prior to a hearing on sanctions, however, Mr. Nordlicht entered into a settlement agreeing to revocation of his registration. (The settlement order also provided that in two years, Mr. Nordlicht may reapply for registration and that nothing in the complaint or in the order granting summary disposition in his case could be used as the sole basis for the denial of his registration.) Mr. Nordlicht also agreed to a $75,000 civil money penalty, a cease and desist order, and a three month prohibition from trading.

To the extent that Mr. Sundheimer by this complaint is suggesting that the Commission has discriminated against him concerning the imposition of sanctions, suffice it to say that the Commission determines the propriety of sanctions to be meted against individual respondents on a case-by-case basis, not with a view toward other respondents in other proceedings. That the Commission has entered into a settlement concerning sanctions against another respondent in a separate, although similar, proceeding in no way limits the discretion of the Commission to impose the type of sanctions it deems appropriate against respondent in this proceeding. And there is no requirement under the Act or the Administrative Procedure Act for absolute uniformity of sanctions for similar violations. See Butz v. Glover Livestock Commission Company, Inc., 411 U.S. 182, 186-187 (1973); Kent v. Hardin, 425 U.S. 1346, 1349-50 (5th Cir. 1970).

ment. Therefore, the Commission HEREBY ORDERS that respondent's motion for a stay is DENIED. 1/

By the Commission (Chairman JOHNSON and Commissioners DUNN, GARDNER and STONE).

Jean A. Webb
Deputy Secretary of the Commission
Commodity Futures Trading Commission

Dated: October 16, 1981

1/ On October 8, 1981, the Division filed a motion to amend the opinion and order in this proceeding to clarify the effect of the Commission's order prohibiting Mr. Sundheimer from trading and to specify the effective date of the other sanctions. The Commission's order was effective upon notice, although the civil money penalty must be paid within thirty days thereafter. Accordingly, except for liquidation of positions open as of that time, respondent was barred from trading and all contract markets were required to refuse respondent trading privileges upon notice of the Commission's September 16, 1981 opinion and order.

APPENDIX C

UNITED STATES OF AMERICA
COMMODITY FUTURES TRADING COMMISSION
2033 K Street, N.W.
Washington, D.C. 20581

In the Matter of :

STEPHEN M. SUNDHEIMER, : CFTC Docket No. 79-22

Respondent :

VINCENT L. MORGAN, Esquire
DONALD R. LEVINE, Esquire
Division of Enforcement
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D. C. 20581
For the Division of Enforcement

JULIUS BERMAN, Esquire
VINCENT J. SYRACUSE, Esquire
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, N. Y. 10022
For the Respondent

Before: ROBERT E. DUNCAN
Administrative Law Judge

INITIAL DECISION AND ORDER

Statement of the Case

On July 13, 1979, a Decision and Order was issued in this administrative proceeding brought against Stephen M. Sundheimer, Respondent, a registered floor broker, granting, in part, summary disposition and determining that (1) a sufficient showing had been made by the Division of Enforcement that Respondent, because of his felony conviction and because of his manipulation of futures prices and fictitious sales of futures contracts in violation of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq. ("Act") -- in the absence of vitiating or countervailing evidence -- is unfit to remain registered as a floor broker, (2) Respondent's manipulation of futures prices and fictitious sales of futures contracts occurred after the effective date of the 1974 amendment to the Act and are within the jurisdiction of the Commission and (3) Respondent's manipulation of futures prices in violation of Section 9(b) of the Act provided a basis for the imposition of sanctions in an administrative proceeding. It was further determined that an evidentiary hearing should be afforded the parties for the purpose of offering evidence on the issues of mitigation, rehabilitation and the appropriateness of the application of any sanctions pursuant to the provisions of the Act. The hearing for this purpose was held on July 25, July 26 and July 27, 1979, in New York, N. Y. The parties were afforded full opportunity to be heard, adduce evidence, call, examine and cross-examine witnesses, submit oral argument and file proposed findings and conclusions.

Issues

The issues remaining for consideration and decision in this case are the following (Tr. 40-A, 41):

I. Whether Respondent has established that there are mitigating facts pertinent to his violations of the Act.

II. Whether Respondent has established facts showing his rehabilitation.

III. Whether, based upon Respondent's violations of the Act and the evidence of record, sanctions should be imposed against Respondent pursuant to the provisions of the Act.

Based upon the entire record, including the exhibits and testimony adduced and from my observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law and Order:

Findings of Fact and Conclusions of Law

1. On July 13, 1979, after consideration of a motion filed by the Division of Enforcement, an opposition thereto by Respondent and supporting papers and arguments by the parties, an Order granting partial summary disposition was issued in this case. It was determined therein that on January 9, 1979, Respondent was convicted of a felony in Federal Court and that Respondent acted with others between September 1974 and July 19, 1976, in fixing, rigging and fraudulently prearranging trades and manipulating prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses. Respondent intentionally and willfully engaged in fictitious sales in violation of the Act and in price manipulation of futures contracts which resulted in artificial prices in violation of the Act.

2. Because the hearing held on July 25, July 26, and July 27, 1979, arguably interjects additional considerations concerning the nature and character of the violations, a re-evaluation of the allegations of the amended complaint in the context of the record as supplemented by the evidence adduced at the hearing has been made. Upon such re-evaluation, the Findings and Conclusions stated in the July 13, 1979 Decision and Order continue to be findings and conclusions in this case and are adopted and confirmed as a part of the Findings and Conclusions in this Initial Decision and Order.

I. The evidence of mitigation in the record fails to establish that the facts and circumstances of the violations alter or alleviate the seriousness and gravity of the violations.

3. As noted, supra, the Division of Enforcement has established a prima facie case of Respondent's willful violations of the Act. In such circumstances, it is Respondent's "burden to go forward to persuade" that sanctions contained in the Act should not be applied, Silverman v. Commodity Futures

Trading Commission, 562 F.2d 432, 438 (7th Cir. 1977); Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977). The evidence submitted at the July 1979 hearing concerning mitigation or extenuating circumstances was fragmentary and insubstantial. Respondent testified and called 16 witnesses who testified in support of his contentions. Respondent stated that his plea of guilty to the criminal charge of aiding and abetting the filing of false tax returns followed discussions between Respondent, Respondent's attorney and Government prosecutors (Tr. 355). Respondent testified that the reason he pled guilty was (Tr. 356-357):

> I came to realize that I was guilty. I was guilty of the crime that I pled guilty to. I don't think I was really guilty of the crime the very first day that I committed the crime.
>
> * * *
>
> I learned it later, and when I knew it I felt that it was wise to own up to it. I wasn't going to run away from it.

Respondent further testified that his involvement in the fictitious sales and price manipulation of futures contracts which resulted in the criminal charge began in 1974 and that he consented to the transactions. As a vice-president of Pressner Trading Corp., his consent to the arrangement was necessary (Tr. 372-373). The arrangement was a "tax straddle" and "it was completed in 1975" (Tr. 383). Respondent testified (Tr. 379-380):

> [C]ertainly the initial transaction was prearranged, but I had a great deal of skepticism whether or not in the end there could be successful prearrangement of the offset because -- but, in any case, it did come out that way, yes.
>
> * * *
>
> When we put the trades on initially we insisted they be of a character of what is known as 'butterfly spreads', which affords a greater degree of protection against peculiar market movements in connection with differences, price differences. Butterfly you would have -- the structure of the transaction affords certain protection.

> We felt that the butterfly spread was our insurance that in case something happened to the prearrangement * * *.

Respondent's testimony reflects a deliberate and knowledgeable action on his part with careful attention to the mechanics of the trading to protect against the positions going awry. Nothing in Respondent's testimony suggests that extraordinary circumstances existed at the time of the challenged transactions, compelling Respondent's actions resulting in Respondent's violations of the Act. Respondent's reasons for the activities found to be violative of the Act were to acquire financial gain (See Tr. 388). I have carefully reviewed the record for convincing evidence of extenuating or mitigating circumstances, and I find and conclude that there is no such evidence attendant to the transactions constituting violations of the Act.

4. Respondent relies upon testimony by Mitchell F. Baumeister, an Assistant District Attorney who was in charge of the investigation on behalf of the State of New York into trading activities on the crude oil futures market of the New York Cotton Exchange. The evidence collected by the investigation was submitted to Federal authorities in New York and Mr. Baumeister was asked to become a Special Assistant United States Attorney and to assist in the further preparation of the cases. He participated in the trial of indictments resulting from the investigation of the crude oil futures market (Tr. 115-116). In furtherance of his duties, Mr. Baumeister had several meetings with Respondent and was present when Respondent testified at the trial of the indictments. His testimony, according to Mr. Baumeister, showed Respondent's "minimal involvement" in the criminal activity concerning the crude oil futures market (Tr. 119-121). Mr. Baumeister did not explain the basis for his assessment that Respondent had only minimal involvement. The record contains no information which can be used to compare or contrast Respondent's actions with the actions of other participants. Respondent's testimony that his agreement was essential to the conduct of the unlawful activities (Tr. 372-373) sharply conflicts with Mr. Baumeister's conclusion that Respondent's involvement was minimal. The testimony of John M. Burns III, Esquire, is also relied upon to show mitigating circumstances (Resp. Brief, pp. 47-48). Mr. Burns was formerly an Executive Assistant United States Attorney for the Southern District of New York and is now practicing law in New York. Mr. Burns stated (Tr. 280-281):

BY MR. MORGAN:

Q. Going back to the nature of Mr. Sundheimer's conviction, are you aware of what he was convicted of?

A. Yes.

Q. What was it?

A. Well, he was convicted to a very limited part of the charges against him. In fact, I discussed with him, prior to his plea of guilty, whether or not he should do it and I was impressed that the plea of guilty would only be -- and I knew this as a U. S. Attorney, a former Executive Assistant -- that the plea was limited to what the plea was to, not to the entire amount of charges. He was pleading only to aiding and abetting the filing of a false return which reflected a rigging of prices, as I recall it, and that he was not pleading guilty to anything else and they were going to let those charges fall into abeyance. I knew at the time essentially that -- what he was pleading guilty to. I had a hunch he could have won the case because he hadn't aided and abetted; he's only condoned. But the fact that condonation, as opposed to aiding and abetting, is such a narrow line and it was affecting him so much because he's the kind of guy who personally reacts -- he doesn't want to do bad things -- and being charged with something wrong was personally affecting him so much, that it seemed to me that he made the right decision to go ahead and get the thing over with so that he could start living a constructive life again. But it was a very limited plea of guilty.

Q. You say he could have won it if he had fought it?

A. That was my opinion, yes.

Q. That's your opinion as to the charge he plead guilty to?

A. That's correct.

While Mr. Burns in his testimony makes light of the substance of the evidence of illegal activity available against Respondent his observations are considerably weakened by Respondent's plea of guilty to the charges in the indictment. Moreover Mr. Burns in his testimony provides no factual explanation to support his statements (Tr. 267-283). A similar sparsity is present in the material submitted from the pre-sentencing report of the probation officer who investigated Respondent. It was concluded in that report that Respondent's unlawful activity exhibited nothing more than "a lack of good judgment and poor discretion" (Tr. 362-363). I have closely reviewed the testimony and exhibits relied upon by Respondent and I find and conclude that there is insufficient evidence to support a determination that extenuating or mitigating circumstances pertaining to Respondent's violations of the Act have been shown.

II. The evidence of rehabilitation fails to establish that Respondent has rehabilitated himself since his violations of the Act.

The Commission has ruled in the case of In re Jack W. Savage, CFTC Docket No. 76-1, COMM. FUT. L. REP. (CCH) ¶ 20,139 at 20,922 (Comm. Opinion and Order, March 1, 1976) that "Evidence introduced by [a Respondent] might include a showing * * * that his actions and his social and business conduct subsequent to the infractions evidence his rehabilitation, integrity and good character in the community and his fitness for registration." Regarding the issue of rehabilitation Respondent relies upon evidence showing cooperation with prosecuting authorities, a full disclosure to the Commission when he applied for renewal of his registration as a floor broker and his work in the New York State Attorney General's Office (Resp. Brief, p. 49).

5. Respondent's full cooperation with the criminal prosecuting authorities as reflected in this record (Tr. 117-140, 354-357; Resp. Ex. 1) is, to be sure, strong evidence in his favor. It is apparent, however, that Respondent offered his cooperation only after he became aware of the criminal investigation and even then made no effort to assist the Commodity Futures Trading Commission in its enforcement of the Act or the New York Cotton Exchange in complying with its obligations to enforce its own rules by coming forward with offers of cooperation (Tr. 365, 381, 383, 389). The failure by Respondent to promptly come forward and volunteer full assistance to the Commission and the Exchange (Tr. 389, 392-393) weighs heavily against him in the evaluation of his claim

of rehabilitation. When Respondent renewed his registration as a floor broker in 1978 he filed documents showing his criminal involvement at that time (Tr. 364). Such disclosure was required under Sections 4e and 4f(1) of the Act, 7 U.S.C. §§6e and 6f (1), and Section 1.10a(a) of the Commission's regulations, 17 C.F.R. §1.10a(a). Respondent, at the time of his application for renewal of his registration, knew the Commission's staff was aware of his activities (Tr. 381). The public service work by Respondent since his violations also cannot be assigned significant weight. This work was required by the United States District Court as an alternative to a jail sentence for the felony conviction (Tr. 146-150, 246-250, 357). Respondent must receive credit for the circumstances that he has accepted his assignments in this work with enthusiasm and has made positive contributions to the work of the State Attorney General's Office (Tr. 255-256). While effective public service work is a positive activity for Respondent, I am convinced that a determination herein that Respondent has demonstrated his rehabilitation is premature.

6. Respondent relies upon the testimony of a number of witnesses who had experience with futures trading as establishing his good character, high reputation and special competence in the futures industry (Resp. Brief, p. 49). I have carefully reviewed and considered the testimony of these witnesses. Generally these witnesses based their testimony concerning Respondent upon knowledge gained prior to 1975 and expressed confidence in Respondent's integrity and capability as a floor broker (Tr. 68, 72-73, 82, 96, 101, 103-104, 158, 160-161, 174, 176, 191, 193-194, 219-220, 230-231, 232-233, 299-303, 332, 333-334, 422, 423-424). Some of the witnesses were unaware, prior to the hearing, of an important event in Respondent's futures trading history, i.e., that sanctions had been applied against him in 1970 for trading after hours on an Exchange in violation of the Exchange's rules and the Commodity Exchange Act (Tr. 78, 93, 234-235, 329-330, 336). I recognize that considerable weight and deference is due to the testimony of these witnesses, however, their general observations and opinions concerning Respondent do not convince me that a finding of rehabilitation is warranted. I find and conclude that the evidence of record fails to show Respondent's rehabilitation since Respondent's violations of the Act.

III. The violations by Respondent warrant sanctions provided by the Act and the sanctions should be designed to effectuate the purposes of the Act.

7. The complaint requests as sanctions in this proceeding that an order be issued (1) revoking the registration of the Respondent, (2) assessing a civil penalty of not more than $100,000.00 for each violation of the Act, (3) requiring Respondent to cease and desist the activities found to be in violation of the Act, and (4) barring Respondent from trading on or subject to the rules of any contract market and requiring all contract markets to refuse trading privileges to Respondent.

8. Respondent's manipulation of futures prices and fictitious sales of futures contracts are among the most serious and destructive practices outlawed by the Act. Such conduct is antithetical to the price discovery and price information functions of the futures markets. The "transactions and prices" on commodity futures markets "are susceptible to speculation, manipulation, and control * * *." Section 3 of the Act, 7 U.S.C. §5. The commodity futures markets are "extremely sensitive" and "[a]t best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities of manipulation to the advantage of the shrewd and unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims" 80 Cong. Rec. 6164 (April 27, 1936). See also, 80 Cong. Rec. 7857-7858 (May 25, 1936). Manipulations and controlled prices for profit "exert a vicious influence and produce abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand and discourage not only this justifiable hedging but disturb the normal flow of actual consignments. A futures market lends itself to such manipulation much more readily than a cash market." Chicago Board of Trade v. Olsen, 262 U.S. 1, 39 (1923). See also, Bartlett Frazier Co. v. Hyde, 65 F.2d 350, 354 (7th Cir. 1933), certiorari denied, 290 U.S. 654.

9. As stated in the July 13, 1979 Decision and Order, p. 16, the Division of Enforcement by proving that Respondent was convicted of a felony in Federal Court and engaged in the practices of price manipulation of crude oil futures contracts and fictitious sales of crude oil futures contracts -- practices prohibited by Sections 4c(a) and 9(b) of the Act -- established a prima facie case of Respondent's unfitness for registration as a floor broker and a basis for the application of other sanctions against Respondent. I find and conclude that there is insufficient evidence of mitigation and rehabilitation of the Respondent in this case and that Respondent is unfit to remain registered as a floor broker. I also find and conclude that the record supports the imposition of sanctions provided in the Act.

10. The complaint states that a determination should be made as to whether Respondent's registration should be revoked if the allegations of the complaint are found to be true and such a sanction is otherwise warranted (Comp. p. 3). The complaint in this case is silent as to the imposition of a suspension of Respondent's registration. The Act authorizes either a suspension or revocation for unlawful activities such as manipulation and fictitious sales. Section 6(b), 7 U.S.C. §9. The Commission in setting forth in the complaint that an Order revoking Respondent's registration may be entered must have intended to say that a sanction as severe as revocation may be imposed or corrective action of a lesser degree may be directed if warranted. I find and conclude that a suspension for six (6) months is reasonable in this case and effectuates the remedial purposes of the Act. Administrative sanctions are not designed as punishment or retribution but rather as a means of obtaining compliance in the future with applicable requirements. A suspension of six (6) months and the other sanctions applied herein will suffice to caution Respondent and others that the Commission will not condone actions which are subversive of the Act and regulations. The Order issued herein shall direct that Respondent's registration as a floor broker be suspended for a period of six (6) months.

11. Section 6(b) of the Act, 7 U.S.C. §9, authorizes as a sanction, upon a determination that a person registered with the Commission has violated the Act, an assessment against "such person [of] a civil penalty of not more than $100,000.00 for each such violation." Section 6(d) of the Act, 7 U.S.C. §9a, further provides that:

> In determining the amount of the money penalty assessed under paragraph (b) of this section, the Commission shall consider, in the case of a person whose primary business involves the use of the commodity futures market -- the appropriateness of such penalty to the size of the business of the person charged, the extent of such person's ability to continue in business, and the gravity of the violation; and in the case of a person whose primary business does not involve the use of the commodity futures market -- the appropriateness of such penalty to the net worth of the person charged, and the gravity of the violation.

Respondent's primary business involves the use of commodity futures markets (Tr. 346, 347-349). Witnesses from a number of commodity brokerage firms testified concerning present and prior business dealings between their firms and Respondent (Tr. 71-73, 83, 93, 102, 158-159, 174-175, 192-193, 198, 219, 231-232, 300, 422-423). Prior to Respondent's conviction and during the past several years, Respondent's annual salary from Pressner Trading Corp., which was based in part upon the profits of the firm, has been in the low six figures (Tr. 363). During the first seven months of 1979 Respondent drew a $200.00 salary each week (Tr. 364). Respondent has net assets of over $1,000,000.00 (Tr. 52, 408-416, 418). Applying the criteria stated in Section 6(d) of the Act, supra, in the case of a person whose primary business involves the use of the commodity futures market, I recognize that Respondent's futures market business is of substantial size and has generated for Respondent a sizeable annual income, that he will be unable to continue in the business for a specified period of time if the provisions of the Order issued in this case become final, however, the amount of money assessed herein considered independently would not preclude continuation of business, and the violations of the Act are of a serious and intensely important nature. Based upon my review of these matters, it is determined that a civil penalty in the amount of $100,000.00 for each of the two violations alleged in the amended complaint and proven in this case should be assessed against Respondent.

12. The Order shall further provide that Respondent shall cease and desist the violations involved in this case. Respondent shall also be prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final.

13. All proposed findings and conclusions and contentions presented by the parties for the record have been considered. Not all of these proposed findings and conclusions and contentions have been specifically mentioned. Any such matters inconsistent with this Initial Decision and Order are found and concluded to be without merit.

Based upon the foregoing Findings of Fact and Conclusions of Law, I issue the following:

Order

1. The registration of Respondent, Stephen M. Sundheimer, as a floor broker is hereby suspended for a period of six (6) months from the date on which this Order becomes final.

2. Respondent, Stephen M. Sundheimer, is directed to cease and desist any manipulation or attempt to manipulate commodity futures prices or fictitious sales or attempted fictitious sales of commodity futures contracts on or subject to the rules of any contract market.

3. Respondent, Stephen M. Sundheimer, is prohibited from trading on or subject to the rules of any contract market for a period of twenty-four (24) months from the date on which this Order becomes final. All contract markets shall refuse all trading privileges to the Respondent until the expiration of the twenty-four (24) month period. Such prohibition and refusal shall apply to all trading done and positions held directly by the Respondent, either for his own account or as the agent or representative of any other person or firm, and to all trading done and positions held indirectly through persons or firms owned or controlled by the Respondent, or otherwise.

4. Respondent, Stephen M. Sundheimer, is assessed and shall pay to the Commission thirty (30) days after this Order becomes final a civil penalty in the amount of $100,000.00 for each of the two violations of the Act for a total civil penalty in the amount of $200,000.00.

5. The relief requested that Respondent Stephen M. Sundheimer's registration as a floor broker be revoked is hereby denied. In all other respects, the amended complaint is sustained. Pursuant to the Commission's Rules of Practice, this Order shall become final thirty (30) days after service thereof on all parties to this proceeding.

6. A copy of this Initial Decision and Order shall be served upon each of the parties and on each contract market.

Robert E Duncan
Robert E. Duncan
Administrative Law Judge

Dated: February 15, 1980
Washington, D. C.

APPENDIX D

CFTC
OFFICE OF
HEARING CLERK

COMMODITY FUTURES TRADING COMMISSION 13 3 25 PM '79

2033 K Street, N.W., Washington, D.C. 20581

. . . . . .

In the Matter of: :

STEPHEN M. SUNDHEIMER, : CFTC Docket No. 79-22

Respondent :

. . . . . .

VINCENT L. MORGAN, Esquire
DONALD R. LEVINE, Esquire
Division of Enforcement
Commodity Futures Trading Commission
2033 K Street, N.W.
Washington, D. C. 20581
For the Division of Enforcement

PAUL J. CURRAN, Esquire
VINCENT J. SYRACUSE, Esquire
Kaye, Scholer, Fierman, Hays & Handler
425 Park Avenue
New York, New York 10022
For the Respondent

Before: ROBERT E. DUNCAN
Administrative Law Judge

DECISION AND ORDER
GRANTING, IN PART, SUMMARY DISPOSITION

Statement of the Case

This is an administrative proceeding brought against Respondent, Stephen M. Sundheimer, a registered floor broker. On January 16, 1979, a copy of the Commission's Complaint and Notice of Hearing, pursuant to Sections 6(b), 6(c) and 8a(3) of the Commodity Exchange Act, as amended, 7 U.S.C. §§ 1 et seq. ("Act"), was forwarded to Respondent. Respondent, by counsel, filed an answer to the complaint on February 5, 1979. On March 15, 1979, an Order was entered granting a motion to amend the complaint in certain respects and on March 19, 1979, Respondent filed an answer to the amended complaint. A motion for summary disposition by the Division of Enforcement was filed on February 26, 1979. A response in opposition to the motion for summary disposition was filed on behalf of Respondent on March 26, 1979. Oral argument on the motion was held on May 25, 1979. At the conclusion of the oral argument the parties were advised that the motion for summary disposition would be granted, in part, and denied, in part, and that findings of fact, conclusions of law and an order would be issued concerning the motion. It was further provided that an evidentiary hearing would be convened on July 9 and 10, 1979, rescheduled to July 25, July 26 and July 27, 1979, on the issues remaining in the proceeding touching upon any mitigation and rehabilitation and sanctions, if any, to be applied, such issues being considered inappropriate for resolution pursuant to the motion for summary disposition (Tr. 40-A, 41). */

Issues Presented for Summary Disposition

The issues considered here and which are deemed suitable for findings of fact and conclusions of law and order on the motion for summary disposition are the following (Tr. 40-A):

I. Whether sufficient showing has been made by the Division of Enforcement -- in the absence of rebutting evidence of mitigation, rehabilitation or the inappropriateness of any sanction -- that Respondent,

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*/ The record references, i.e., "Tr." followed by a number or numbers, are to the pages of the transcript of the oral argument presented by the parties on May 25, 1979.

because of his conviction of a felony and his activities involving manipulation of futures prices and fictitious sales of futures contracts, is unfit to remain registered as a floor broker and may be subject to other sanctions under the Act; and

II. Whether Respondent's activities involving manipulation of futures prices and fictitious sales of futures contracts all occurred prior to the effective date of the 1974 amendment to the Act and are thus outside the reach of the Commission's jurisdiction; and

III. Whether Respondent's activities insofar as they involve manipulation of futures prices in violation of Section 9(b) of the Act afford a basis for the Division of Enforcement to seek imposition of administrative sanctions.

Based upon the entire record, including the amended complaint, answer to the amended complaint, motion for summary disposition and exhibits thereto, response in opposition to the motion and exhibits and attachments thereto, and the oral argument submitted by the parties on May 25, 1979, I make the following findings of fact, conclusions of law and order:

Findings of Fact and Conclusions of Law

1. The parties appear to agree, at least with respect to the matters which are to be considered here, that there are no contested genuine issues of material fact. What is disputed are essentially legal questions and the proper interpretation to be placed upon the material facts. I find and conclude, with respect to the issues under consideration, that there is no genuine issue as to any material fact, that there is no necessity that further facts concerning these issues be developed

in the record, and that the Division of Enforcement is entitled to a decision in its favor on such issues as a matter of law.

2. It is averred, in the amended complaint, that Respondent, a registered floor broker, is unfit to remain registered in that, as paragraph 2 of Count I of the amended complaint states, he has been convicted of a felony violation. It is specifically stated that (Comp. p. 1):

> On or about January 9, 1978, [Respondent] was convicted of knowingly aiding, assisting, counseling, and advising the preparation of returns, affidavits, claims and other documents with respect to the internal revenue laws which were false and fraudulent as to material matters, a felony, in violation of Title 26, United States Code, Section 7206(2).

In Count II of the amended complaint, it is averred that Respondent violated Section 9(b) of the Act, 7 U.S.C. §13(b), in that he attempted to and did manipulate the prices for futures contracts. It is specifically stated that (Comp. p. 2):

> From about September 1974 to about October 1976, [Respondent] violated, or aided and abetted violations of, Section 9(b) of the Act, 7 U.S.C. §13(b), in that [Respondent], singly and in concert, directly and indirectly, attempted to manipulate and did manipulate prices of crude oil futures traded on the Petroleum Associates of the New York Cotton Exchange, Inc. in order to create predetermined losses and gains in commodity futures accounts.

It is further averred in Count II of the amended Complaint that Respondent violated Section 4c(a) of the Act, 7 U.S.C. §6c(a), by engaging in transactions which were fictitious sales of futures contracts. It is specifically alleged that (Comp. p. 2):

> From about September 1974 to about October 1976, [Respondent] violated, or aided and abetted violations of, Section 4c(a) of the

> Act, 7 U.S.C. §6c(a), in that [Respondent], singly and in concert, directly and indirectly, offered to enter into, entered into, or confirmed the execution of transactions involving crude oil futures traded on the Petroleum Associates of the New York Cotton Exchange, Inc. which transactions were of the character of, or were commonly known to the trade as, wash sales, cross trades, accommodation trades, or fictitious sales, or which were used to cause prices to be reported, registered, or recorded which were not true and bona fide prices, in order to create predetermined losses and gains in commodity futures accounts.

3. The amended complaint provides for the institution of a public proceeding to establish the truth of the allegations and, if found to be true, to determine whether sanctions should be applied in accordance with the terms of the Act. The sanctions proposed are (A) revocation of Respondent's registration, (B) imposition of an order directing Respondent to cease and desist from further violations of Sections 4c(a) and 9(b) of the Act, (C) prohibition of any trading in connection with any contract market by Respondent and the direction to all contract markets to refuse Respondent trading privileges and (D) assessment of a civil penalty of not more than $100,000.00 for each violation of the Act.

4. Respondent in his answer to the amended complaint admits that he is registered as a floor broker and admits that (Ans. p. 1):

> [O]n October 27, 1978 [Respondent] waived indictment and pleaded guilty to an Information which charged a violation of Title 26, United States Code, §7206(2) and further admits that he was sentenced on January 9, 1979.

The remaining allegations of the amended complaint are denied. Certain affirmative defenses are set forth in the answer. First, it is stated that representatives of the Commodity Futures Trading Commission in April 1976 "examined the records

of Pressner Trading Corp. ("Pressner") with which [Respondent] is affiliated and attained full knowledge of the involvement of Pressner and Mr. Sundheimer in the trading of crude oil futures on the Petroleum Associates of the New York Cotton Exchange, Inc. Thereafter [the Commission's staff] monitored the trading of crude oil futures and, upon information and belief, [the Commission's staff] assisted state and federal prosecutors in connection with their investigation of crude oil futures and alleged use of prearranged trades and necessarily learned of [Respondent's] involvement" (Ans. p. 2). The Division of Enforcement, it is stated in the answer, notwithstanding its knowledge of Respondent's activities, failed to take any action to have administrative sanctions applied to Respondent until the instant proceeding which was filed on January 16, 1979. Prior to the time Respondent's registration as a floor broker was to expire, an application for renewal was submitted "which specifically disclosed the guilty plea and annexed a copy of the plea transcript" (Ans., p. 4). The Respondent's application for renewal was granted and the Commission necessarily has determined that Respondent is fit to engage in business and no good cause exists to deprive Respondent of his registration. Second, it is stated that the activities referred to in the complaint occurred prior to April 21, 1975, the effective date of the 1974 amendment to the Act and before the trading of crude oil futures contracts was made subject to the provisions of the Act, and, third, while price manipulation of futures contracts is prohibited by Section 9(b) of the Act, administrative sanctions are not authorized for violations of Section 9(b) because that Section by its terms provides only for criminal penalties for a violation thereof.

5. Attached as an exhibit to the Division of Enforcement's motion for summary disposition is a copy of the one-count Information filed with the United States District Court for the Southern District of New York on October 27, 1978. The Information charges that from September 1974 until on or about July 19, 1976 (Motion, Ex. II):

> In furtherance of the offense charged in this Information, the defendant STEPHEN M. SUNDHEIMER (on behalf of Pressner Trading Corporation, of which at all times relevant to this Information he was vice-president), together with other persons, fixed, rigged and

> fraudulently prearranged trades and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974 and for the fiscal year ending October 31, 1975, and predetermined gains for the oil company in the following fiscal years. As the defendant STEPHEN M. SUNDHEIMER well knew, the aforesaid fraudulent losses were to be claimed on the United States corporation income tax returns of the oil company. And in fact, the aforesaid fraudulent losses attributed to the oil company, C. R. Rittenberry & Associates, Inc., were claimed on the consolidated United States corporation income tax returns filed on behalf of the oil company and other companies affiliated with it, by the oil company's parent, the Deutsche Corporation, for the fiscal years ending October 31, 1974 and October 31, 1975.
>
> (Title 26, United States Code, Section 7206(2)).

6. Attached as an exhibit to the Division of Enforcement's motion for summary disposition is a copy of the transcript of the proceeding before the United States District Court on October 27, 1978, in which the Court explained the charges to Respondent and Respondent entered a plea of guilty to the Information. At that hearing the following transpired (Motion, Ex. III, pp. 4, 9-11):

> BY THE COURT:
>
> Q. Mr. Sundheimer, you are charged in this information with a violation of Section 7206(2) of Title 26. Basically the charges are that you unlawfully, knowingly and wilfully assisted in the preparation of

documents which were fraudulent and false with respect to matters arising under the Internal Revenue laws.

The information charges that you, as vice president of Pressner Trading Corporation, together with other persons, fixed, rigged and fraudulently prearranged trades and manipulated the movement of prices on the crude oil market of the New York Cotton Exchange for the purpose of creating predetermined losses for an oil company for the fiscal year ending October 31, 1974, and for the fiscal year ending October 31, 1975, and predetermined gains for that company in the following years.

The information charges that you knew that these fraudulent losses were to be claimed on the tax returns of the oil company, Rittenberry, and it further charges that they were in fact claimed.

Do you understand those charges?

A. (By the defendant) Yes, I do, your Honor.

* * *

Q. Mr. Sundheimer, I want you, in your own words, to tell me just what it is that you did that is the foundation for your decision to plead guilty to the information.

A. Sometime in the fall of 1974, my associate, Mr. Nordlicht, agreed with Mr. Perlmutter and Mr. Turkish that our firm, Pressner Trading Corporation, would take the other side of certain prearranged commodity futures contracts in crude oil futures that would ultimately enable an oil company to obtain tax benefits that they wouldn't otherwise be entitled to, had we not done that.

I gave my consent to that arrangement and I was present when it was made.

Q. And your consent was necessary to the making of that arrangement?

A. Yes, it was, your Honor.

Q. And did you understand that the purpose of that arrangement was to enable the oil company to take certain tax losses on its corporate tax return?

A. Yes, I did, your Honor.

Q. And did you also then give your consent to a similar arrangement for the following year?

A. I think that it was implicit in the initial understanding. There was no additional consent required.

Q. Are you in good health today, Mr. Sundheimer?

A. I hope so.

THE COURT: Very well, gentlemen. I shall accept the plea.

THE CLERK: Are you Stephen Sundheimer?

THE DEFENDANT: Yes sir.

THE CLERK: On an information filed this day, October 27, 1978, how do you plead to this information?

THE DEFENDANT: I plead guilty, sir.

7. On January 9, 1979, the United States District Court for the Southern District Court of New York entered a Judgment and Probation/Commitment Order in the criminal case

against Respondent. The Judgment (Motion, Ex. I) provides that there was a plea of guilty by Respondent "and the court being satisfied that there is a factual basis for the plea, * * * [the] finding & judgment [is that Respondent] has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly aid[ing], assist[ing] and advis[ing] in the preparation of false and fraudulent income tax returns (Title 26, U. S. Code, Section 7206(2))." Respondent was sentenced to imprisonment for a period of one year and fined $5,000.00 plus cost of prosecution. Execution of the sentence of imprisonment was suspended and Respondent was placed on probation for one year with a special condition that Respondent devote one year, on a full time basis, to some community activity. The Court subsequently approved, as a special condition of probation, service by Respondent on a full time basis without pay, as a technical assistant with the Bureau of Environmental Protection of the New York State Attorney General's Office. It is conceded by Respondent in his opposition to the motion for summary disposition (Response, p. 2), that "Mr. Sundheimer admits that he has been convicted on a guilty plea to a felony * * *" and that the "conviction was rooted in certain facts which were admitted when Mr. Sundheimer pleaded guilty * * *."

I. The Division of Enforcement has sufficiently shown-- in the absence of any dispositive, rebutting evidence establishing mitigation, rehabilitation or inappropriateness of any sanction -- that Respondent because of his conviction of a felony and his admitted manipulation of futures contract prices and his admitted fictitious sales of futures contracts is unfit to remain registered as a floor broker.

8. It is established by the admissions and exhibits submitted by the parties and I so find and conclude that on January 9, 1979, Respondent was convicted of a felony in Federal court. It is further established and I so find and conclude that Respondent admitted to having acted with others between September 1974 and July 19, 1976, in "fix[ing], rigg[ing] and fraudulently prearrang[ing] trades and manipulat[ing] the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined

losses" as charged in the criminal Information, supra, paragraph No. 5. Further I adopt as findings and conclusions in this case the allegations contained in the Information. Section 4c(a) of the Act, 7 U.S.C. §6c(a), provides, in part:

> It shall be unlawful for any person to offer to enter into, enter into or confirm the execution of, any transaction involving any commodity, which is or may be used for (1) hedging any transaction in interstate commerce in such commodity or the products or byproducts thereof, or (2) determining the price basis of any such transaction in interstate commerce in such commodity, or (3) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof--
>
> (A) if such transaction is, is of the character of, or is commonly known to the trade as, a "wash sale", "cross trade", or "accommodation trade", or is a fictitious sale;
>
> * * *

The Judicial Officer in the United States Department of Agriculture decision, In re Jean Goldwurm, et al., 7 Agr. Dec. 265, 275-276 (1948) ruled that:

> Section 4c of the act does not stop at the prohibition of 'wash sales.' It also prohibits any transaction that is of the character of a wash sale, is commonly understood to the trade as a wash sale, or is a fictitious sale. The language could hardly be broader and, together with the other prohibitions in this section and other parts of the act, evinces an intention to outlaw insofar as possible all schemes of trading that are artificial and are not the result of arms-length trading on the basis of supply and demand factors and trading opinion of these factors. [emphasis in original].

The legislative history of the Commodity Exchange Act shows that Congress intended that the transactions relating to a futures contract market be responsive to the economic forces exerted by the market such as supply and demand rather than the dictates of one or a few traders. During the Congressional debates in 1936 on the bill which amended the Grain Futures Act and renamed the act to the Commodity Exchange Act, it was stated (80 Cong. Rec. 6164 (1936)):

> There is a widespread public interest attached to the business of future trading. The very nature of the business is such as to make it fraught with temptation for those who are disposed to take unfair advantage. In no other business is there found the same combination of circumstances and profit possibilities to tempt the unscrupulous.
>
> It is the purpose of this bill to reduce to a minimum the possibility of unscrupulous trading and to permit the benefits of such trading to be obtained by those entitled to them.
>
> There can be no defense for such fraudulent practices as have been pointed out in transactions in these grain exchanges. The present law does not reach them. These markets are extremely sensitive. A false or misleading statement or fictitious trading may in a few minutes turn thousands of dollars into the pocket of some unscrupulous trader, * * *. At the same time it may cause millions of dollars in loss to farmers and others affected by a fictitious price movement. Large speculators may temporarily upset the whole price structure.
>
> * * *
>
> At best, with all the safeguards possible to be thrown around transactions in futures, these market exchanges possess possibilities

> of manipulation to the advantage of the shrewd and unscrupulous trader with corresponding loss to the thousands of producers who are innocent victims.

"The purpose and object of the whole bill is to give a free, open market * * *" [emphasis supplied] (80 Cong. Rec. 7932 (1936)). Section 9(b) of the Act, 7 U.S.C. §13(b), states:

> It shall be a felony punishable by a fine of not more than $100,000 or imprisonment for not more than five years, or both, together with the costs of prosecution, for any person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity, or knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce * * *.

In the case of Cargill, Incorporated v. Hardin, 452 F.2d 1154, 1163 (8th Cir. 1971), certiorari denied, 406 U. S. 932 (1972), the Court held:

> We think the test of manipulation must largely be a practical one if the purposes of the Commodity Exchange Act are to be accomplished. The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.

The Commission ruled in the case of In Re Hohenberg Bros. Company and Julien J. Hohenberg, CFTC Docket No. 75-4, COMM. FUT. L. REP. (CCH) ¶ 20,271 at 21,477 (Commission Decision and Order, February 18, 1977) that:

> [M]anipulation has been defined generally as conduct intentionally engaged in resulting in an artificial price, i.e., a price that does not reflect the basic forces of supply and demand.
>
> A finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity (as determined by the forces of supply and demand) and as a result of such conduct or course of action an artificial price was created.

Respondent is an experienced floor broker who has been trading in commodity futures on the Exchanges since 1968 (Sentencing Memorandum on Behalf of Defendant Stephen M. Sundheimer, p. 4). In stipulating to the statements contained in the Information, Respondent clearly established and I so find and conclude that he intentionally and wilfully engaged in fictitious sales and price manipulation of futures contracts which resulted in artificial prices. I find and conclude on the basis of the uncontroverted facts that the Division of Enforcement has sufficiently established, except that there is no evidence that the violations occurred after July 19, 1976, the averments of paragraph 2 of Count I and paragraphs 4 and 5 of Count II of the amended complaint.

9. It is contended by the Division of Enforcement that the criminal conviction constitutes estoppel as to the matters determined by the judgment in the criminal case. In a recent decision relied upon by the Division of Enforcement, the Supreme Court held that under the "contemporary law of collateral estoppel," trial courts have "broad discretion" to determine whether offensive collateral estoppel should be applied in a particular case. Offensive collateral estoppel in this context "occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another

party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." Parklane Hosiery Co., Inc. v. Shore, ____ U. S. ____, 99 S. Ct. 645, 649 fn. 4, 651-652 (1979). Offensive collateral estoppel may be invoked against a party if no unfair burden would be imposed upon the party and that party "received a 'full and fair' opportunity to litigate" his claims in the prior proceeding, Id., 99 S. Ct. at 652. Respondent contends that any collateral estoppel pertaining to his conviction is limited to his crime and his "crime was that he aided and abetted the filing of a false tax return in 1974 and in admitting his guilt he did not admit to all of the matters charged in the information" (Response to Motion, pp. 30-31). The record, however, does not support this contention. At the hearing before the District Court on October 27, 1978, Respondent without reservation pleaded guilty to all the facts charged in the Information, supra at paragraph 6. Respondent correctly argues that under the "general doctrine of estoppel," the "estoppel extends only to questions 'distinctly put in issue and directly determined' in the criminal prosecution." See Emich Motors v. General Motors, 340 U. S. 558, 568-569 (1951). Where there is a guilty plea the truth of the averments in the information is admitted, United States v. Rubin, 243 F.2d 900, 902 (7th Cir. 1957). "[I]n the case of a guilty plea collateral estoppel may apply by examining the record as to the offense charged and the determinations 'essential to a conviction'." Metros v. United States District Court for the District of Colorado, 441 F.2d 313, 319 (10th Cir. 1970) (Per Judge Holloway, concurring in the result). I find and conclude that Respondent's judgment of conviction based upon his guilty plea and his statements concerning his participation in the arrangement which constitute the factual basis for the guilty plea is substantive evidence of his violations of the prohibitions against fictitious sales of commodity futures contracts and the manipulation of the prices of commodity futures contracts. I further find and conclude that Respondent is collaterally estopped from contesting the factual allegations set forth in the Information filed in the criminal case.

10. Section 8a(3) of the Act, 7 U.S.C. §12a(3), provides that the Commission is authorized to suspend or revoke the registration of any person registered under the Act:

> * * * if cause exists under [Section 8a](2)(B) or (C) which would warrant a refusal of registration of such person * * *.

Section 8a(2)(B) of the Act, 7 U.S.C. §12a(2)(B), provides that the Commission is authorized to refuse to register any person:

> (B) if it is found, after opportunity for hearing, that the applicant is unfit to engage in the business for which the application for registration is made, (i) because such applicant * * * at any time engaged in any practice of the character prohibited by this Act or was convicted of a felony in any State or Federal court * * * (ii) for other good cause shown;
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> * * *

The purpose of this Section is to provide a means whereby the Commission can "'bar from this occupation those persons who by their past actions have demonstrated that they cannot be entrusted with customers' trades and funds' (H. R. Rep. No. 93-975, 93d Cong., 2nd Sess. 78 (1974))." Division of Enforcement v. Alan H. Rodin, [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶ 20,114 at 20,815 (ALJ Decision affirmed, Feb. 3, 1976). "The plain words of §8a(2)(B)(i) of the Act reflect a Congressional judgment that proof of a felony conviction, without more, will establish a prima facie case of an applicant's unfitness." Savage v. Commodity Futures Trading Commission, 548 F.2d 192, 196 (7th Cir. 1977). By proving that Respondent was convicted of a felony in Federal court and engaged in the practices of price manipulation of crude oil futures contracts and fictitious sales of crude oil futures contracts--practices prohibited by Sections 4c(a) and 9(b) of the Act--the Division of Enforcement established a prima facie case of unfitness of the Respondent for registration as a floor broker and a basis for the application of other sanctions against Respondent.

11. It is contended by Respondent that because of the awareness of the Commission's staff of Respondent's activities prior to his plea of guilty to the indictment on October 27, 1978,

and the Commission's action in granting Respondent's application for renewal of registration, the Division of Enforcement is estopped and is not entitled to bring or maintain this proceeding. Clearly, however, the Division of Enforcement cannot be faulted for waiting until after disposition of the criminal case before seeking to invoke the provisions of the Act. If a judgment of not guilty had been rendered in the criminal proceeding, the instant proceeding would necessarily have been quite different. This proceeding was instituted on January 16, 1979, promptly after Respondent's conviction on January 9, 1979. And, of course, one of the grounds or reasons for this proceeding, the felony conviction, did not exist prior to January 9, 1979. As to Respondent's activities concerning the manipulation of futures contract prices on the exchange and fictitious sales, the terms of the Act are dispositive of Respondent's contention. Under Section 8a of the Act, 7 U.S.C. §12a, the Commission has the choice, on the one hand, of renewing the registration of a person and subsequently commencing a proceeding to revoke or suspend such registration for violations of the Act and to impose other sanctions or, on the other hand, refusing to renew a registration pending institution and completion of an administrative proceeding to determine whether the applicant is fit for registration and whether other sanctions should be applied. The Commission in authorizing the commencement of this proceeding after having renewed Respondent's application for registration has acted in accord with the provisions of the Act. No unfairness or improper treatment of Respondent is apparent. Generally estoppel cannot be used as a defense against an enforcement proceeding by a Federal agency, United States Immigration and Naturalization Service v. Hibi, 414 U. S. 5, 8 (1973); Wallace Corp. v. National Labor Relations Board, 323 U. S. 248, 253 (1944). The defense of estoppel has been rejected by courts in cases under the Commodity Exchange Act. Nelson v. Secretary of Agriculture, 133 F.2d 453, 455 (7th Cir. 1943); Goodman v. Benson, 286 F.2d 896, 900 (7th Cir. 1961). In the case of In re Jeffrey L. Silverman, CFTC Docket No. 76-18, [1977] COMM. FUT. L. REP. (CCH) ¶ 20,410 at 21,641 (Commission Decision March 14, 1977), affirmed, 562 F.2d 432 (7th Cir. 1977), Respondent, in a prior proceeding, had been found to have violated the Commodity Exchange Act. While the prior proceeding was pending before an Administrative Law Judge, the 1974 amendment to the Act became effective and:

> required for the first time under Section 4k, 7 U.S.C. §6k (Supp. V, 1975), that associated persons of futures commission merchants, such as respondent, be registered with the Commission to continue to act in that capacity. Respondent filed an application for registration as an associated person, which indicated the existence of the then pending proceeding against him. Because no final decision had been rendered against respondent at the time he filed his application, however, registration was granted. Id. at 21,642.

The Commission ruled that the violations established in the prior proceeding warranted the subsequent revocation of the associated person's registration. Ibid. Although the Commission and the Court of Appeals did not expressly say that the registration (and subsequent renewal of registration, see 562 F.2d at 434) which occurred while the Commission was aware of allegations against the applicant raised no bar of estoppel in the later proceeding to revoke his registration, the disposition of that case by the Commission and the Court of Appeals furnishes strong support for the determination herein that the grant of an application for registration will not preclude a later proceeding to determine whether the registration should be revoked and other sanctions should be applied. "[T]he premises implicit" in a decision "are as authoritative" as the holding, Murray v. Roberts, 103 F.2d 889, 894 (2d Cir. 1939), per Judge Learned Hand, petition for certiorari dismissed pursuant to stipulation, 311 U. S. 720 (1941). See also Fouts v. Maryland Casualty Co., 30 F.2d 357, 359 (4th Cir. 1929), certiorari denied, 279 U. S. 852. Respondent has conceded that at all relevant times, he was aware that the Commission and its staff would insist upon the application of the provisions of the Act. This circumstance was reported to the District Court prior to Respondent's sentencing on January 9, 1979 (Sentencing Memorandum on Behalf of Defendant Stephen M. Sundheimer, p. 9). There is no basis here for the application of estoppel, laches or a finding of an abuse of discretion and these contentions must be rejected.

II. The price manipulation and fictitious sales transactions underlying the felony conviction admittedly extended to July 19, 1976, and such transactions were within the Commission's jurisdiction.

12. It is contended by Respondent that his activities concerning crude oil futures occurred prior to the time the Commission assumed jurisdiction over this commodity and there is no authority to go forward with this proceeding. Prior to 1975, the Act was enforced by the Commodity Exchange Authority in the United States Department of Agriculture and only specifically enumerated agricultural commodities were within the coverage of the Act, Section 2(a), 7 U.S.C. §2 (1970 ed.). The 1974 amendment extended coverage to "all other goods and articles * * * and all services, rights, and interests in which contracts for future delivery are presently or in the future dealt in * * *," Section 2(a)(1) of the Act, 7 U.S.C. §2 (1976 ed.). The 1974 amendment became effective on April 21, 1975, Section 418 Pub. Law 93-463, 88 Stat. 1415, and accordingly the term "commodity," as used in Sections 4c(a) and 9(b) of the Act, 7 U.S.C. §§6c(a) and 13(b), was extended on that date to include crude oil. On April 18, 1975, the Commission entered orders granting provisional designation to the "Petroleum Associates of the New York Cotton Exchange, Inc., as a contract market for crude oil and liquified propane gas," 40 Fed. Reg. 19035 (May 1, 1975). On May 5, 1975, the Commission extended the provisional designation, 40 Fed. Reg. 21769 (May 19, 1975), and on July 18, 1975, the Commission issued an order approving the application of the Petroleum Associates of the New York Cotton Exchange, Inc., as a contract market for crude oil and liquified propane gas," [Transfer Binder 1975-1977 Decisions] COMM. FUT. L. REP. (CCH) ¶ 20,062 at 20,679. It is clear that on the effective date of the 1974 amendments to the Act, i.e., April 21, 1975, the Commission had and was exercising jurisdiction over crude oil futures contracts traded on the Petroleum Associates of the New York Cotton Exchange, Inc.

13. As stated supra, Paragraphs 5-6, Respondent admitted in the criminal case that from September 1974 until July 19, 1976, he, "together with other persons, fixed, rigged and fraudulently prearranged, traded and manipulated the movement of prices on the Crude Oil Market of the New York Cotton Exchange for the purpose of creating predetermined losses * * *."

Respondent explained to the District Court that under the terms of the arrangement which began in 1974 and was intended to extend at least into the following year, i.e., 1975, Respondent's firm would take "the other side of certain pre-arranged commodity futures contracts in crude oil futures." I find and conclude that the uncontested facts show that the price manipulation and fictitious sales violations extended through 1975 and until July 19, 1976, as stated in the Information, and were within the jurisdiction of the Commission which was effective on April 21, 1975, and conferred by the 1974 amendment to the Act.

III. Section 9(b) of the Act outlaws any price manipulation or attempted price manipulation of any commodity subject to the Act and Sections 6(b), 6(c) and 8a(3) of the Act authorize administrative proceedings seeking corrective action or the application of sanctions for violation of any provision of the Act.

14. Respondent states in his opposition to the motion for summary disposition and in his answer to the amended complaint that the averments in the amended complaint concerning Respondent's attempt to manipulate and manipulation of the prices of crude oil futures contracts in violation of Section 9(b) of the Act should be dismissed because Section 9(b) makes price manipulation a felony but does not authorize the Commission to initiate an administrative proceeding. A consideration of the terms of the Act and the assertions in the amended complaint establishes that Respondent's contentions on this issue cannot be adopted.

15. To be sure, Section 9(b) of the Act, 7 U.S.C. §13(b), declares that any price manipulation or attempted price manipulation shall be a felony punishable by fine or imprisonment and does not in the same section provide for administrative proceedings in the event of such violations. The amended complaint in the instant proceeding states that this matter is brought to determine whether, if the allegations of the complaint are deemed to be true, an order should be entered pursuant to Sections 6(b), 6(c) and 8a(3) of the Act, 7 U.S.C. §§9, 13b and 12a(3). These sections authorize the imposition of sanctions or corrective measures following an

administrative proceeding where facts have been developed establishing that a person, inter alia, "is violating or has violated any of the provisions of this Act * * *" (Sections 6(b) and 6(c), 7 U.S.C. §§9 and 13b) or "at any time engaged in any practice of the character prohibited by this Act * * *" (Section 8a(2)(B), 7 U.S.C. §12a(2)(B), referred to in Section 8a(3), 7 U.S.C. §12a(3)). In the case of Great Western Food Distributors v. Brannan, 201 F.2d 476, 478 (7th Cir. 1953), certiorari denied, 345 U. S. 997, the Court held:

> The order is attacked on several grounds. The first, that the complaint did not charge an offense subject to administrative disciplinary action under Section 6(b) of the Act is, we think, without merit. Section 6(b) provides for disciplinary proceedings if a person is violating or has violated any of the provisions of this chapter * * *. Section 9 makes it unlawful to attempt to manipulate the price of a commodity in interstate commerce; to attempt to corner a commodity in interstate commerce, or to corner any such commodity. The complaint charged petitioners with the very conduct prohibited by this section. There can be no doubt that the averments constituted an offense under Section 6(b) of the act.

I find and conclude that there is no basis to dismiss the averments of the amended complaint which allege that Respondent violated Section 9(b) of the Act and that, in part, by reason of the allegation, Respondent is subject to this proceeding pursuant to Sections 6(b), 6(c) and 8a(3) of the Act.

Based upon the foregoing, I issue the following:

Order

1. The Division of Enforcement's motion for summary disposition of this proceeding should be and is hereby GRANTED, in part, and it is determined that the Division of Enforcement

has established a sufficient showing--in the absence of rebutting evidence of mitigation, rehabilitation or the inappropriateness of any sanction--that Respondent, Stephen M. Sundheimer, because of his conviction of a felony and his activities involving manipulation of futures prices and fictitious sales of futures contracts is unfit to remain registered as a floor broker and may be subject to other sanctions under the Commodity Exchange Act, as amended; and

2. The Respondent's manipulation of futures prices and fictitious sales of futures contracts is determined to have continued after the effective date of the 1974 Amendment to the Commodity Exchange Act and is within the reach of the Commission's jurisdiction; and

3. An administrative proceeding may be maintained and if otherwise appropriate, administrative sanctions may be applied for proven violations of Section 9 of the Commodity Exchange Act, as amended, 7 U.S.C. §13; and

4. To the extent that the Division of Enforcement's motion for summary disposition seeks the imposition of sanctions at this time, the motion should be and is hereby DENIED without prejudice.

5. At the hearing scheduled for July 25, July 26 and July 27, 1979, the parties will be afforded an opportunity to offer evidence on the issues remaining for decision, viz., mitigation, rehabilitation and the appropriateness of the application of any sanction pursuant to the Commodity Exchange Act, as amended.

Robert E Duncan
Robert E. Duncan
Administrative Law Judge

Dated: July 13, 1979
Washington, D. C.